No. 06-1647 2007

In The
Supreme Court of the United States

EDWARD GREEN JAMESON,

Petitioner,

v.

COMMONWEALTH OF KENTUCKY,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Kentucky

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. When challenging a speech-restrictive law under the First Amendment by attempting to disprove that the regulation furthers an important or substantial governmental interest under *United States v. O'Brien*, 391 U.S. 367 (1968), what are the evidentiary standards that a litigant must meet in order to be able to "cast direct doubt" upon a municipality's purported rationale and justification for the enactment of that law pursuant to the plurality decisions of this Court in *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000), and *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425 (2002)? In addition to the conflicts regarding this issue in the lower courts, at least two appellate courts, the Illinois Supreme Court and the Ninth Circuit, have even stated that they simply will not specify the standards to which such evidence must conform.

2. In light of the highly-fractured and plurality nature of this Court's three most recent opinions concerning the "secondary effects" doctrine, *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991), *Pap's A.M.*, and *Alameda Books*, which has engendered significant confusion in the lower courts, should this Court revisit the use of that doctrine?

PARTIES TO THE PROCEEDINGS BELOW

Pursuant to Supreme Court Rule 14.1(B), the parties to the proceedings in the Kentucky Supreme Court action below are as indicated in the caption of this petition. Because Petitioner is an individual, no corporate disclosure statement is required under Supreme Court Rule 29.6.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Edward Green Jameson, respectfully prays that a writ of certiorari be issued to review the rulings of the Kentucky Supreme Court entered in this proceeding on November 22, 2006, and March 22, 2007.

OPINIONS BELOW

The opinion of the Kentucky Supreme Court is reported as *Commonwealth of Kentucky v. Jameson*, 215 S.W.3d 9 (Ky. 2006). App. 1-54. The order of that court denying a Petition for Rehearing is unreported, and is found at App. 91. The opinion of the Kentucky Court of Appeals is also unreported, and appears at App. 56-83. The decision of the McCracken District Court denying Mr. Jameson's motion to declare as unconstitutional the ordinance pursuant to which he was being prosecuted is reproduced at App. 89-90, and the Order of the McCracken Circuit Court affirming that decision appears at App. 84-87.

JURISDICTION

The Kentucky Supreme Court denied a timely filed Petition for Rehearing by order dated March 22, 2007. This petition is filed within 90 days of that date. This Court therefore has jurisdiction to review the ruling of the Kentucky Supreme Court pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS, STATUTES, AND ORDINANCES INVOLVED

The text of the First Amendment to the United States Constitution is found at App. 92, and the Fourteenth Amendment is reproduced at App. 93-94. McCracken County Ordinance 2000-4 (the regulatory scheme that served as the basis for the Petitioner's conviction below) appears at App. 95-112.

STATEMENT OF THE CASE

Petitioner, Edward Green Jameson, manager of an entertainment facility known as Regina's II (*"Regina's"*), was criminally cited on August 19, 2000, for violation of McCracken County Ordinance 2000-4, entitled "An Ordinance Providing Regulation of Sexually Oriented Businesses and their Employees" (hereinafter sometimes "Ord. 2000-4," or simply the "Ordinance"). The specific violations were delineated as: (1) Operating after the hour of 1:00 a.m., contrary to Section IV(e) of the Ordinance; (2) dancers appearing in a state of nudity contrary to Section VII(b); and (3) entertainers having contact with patrons during a performance, contrary to Section VII(a).[1]

Ordinance 2000-4 regulates so-called "sexually oriented businesses," including adult amusement arcades, adult bookstores, adult novelty stores, adult video sites, adult cabarets, adult motels, adult motion picture theatres, adult

[1] There is no "respondeat superior" provision contained in the Ordinance that would make a business manager, such as Mr. Jameson, criminally responsible for the acts of entertainers who may appear in a state of nudity or have contact with patrons during a performance.

stage theatres, escort agencies and sexual escort services. *See* App. 96, 105. *Regina's*, which Mr. Jameson was managing, arguably fell within the definition of a "sexually oriented business" because it featured live exotic dance performances and could therefore be considered to be an "adult cabaret."[2]

The Ordinance, which became effective on April 26, 2000, prohibits, among other things, any person from appearing nude while engaged in any live performance on the premises (§ VII(b) (App. 110)); any entertainer from having any physical contact with any person during any performance (regardless of how they may be attired) (§ VII(d) (App. 110)); and the regulated establishments from remaining open at any time between 1:00 a.m. and 6:00 a.m. on any day (§ IV(e) (App. 110)). Violations of Ord. 2000-4 are subject to criminal penalties consisting of fines up to $500.00, or imprisonment up to twelve months, or both. § XI (App. 111).

It is noteworthy to observe that the Ordinance does not wholly eliminate public nudity, nor does it seek to ban nude or "topless" entertainment throughout McCracken County. Rather, it only criminalizes such activities at businesses which "regularly" feature persons who appear

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[2] " 'Adult Cabaret' means a night club, bar, restaurant, or similar commercial establishment which regularly features: (a) Persons who appear in a state of nudity or semi-nude; or (b) Live performance which are characterized by the exposure of 'specified anatomical areas' or by 'specified sexual activities'; or (c) Films, motion pictures, video cassettes, slides or other photographic reproductions which are characterized by the depiction of description of 'specified sexual activities' or 'specified anatomical areas.' " Ord. 2000-4, § II(3) (App. 101).

nude[3] or "semi-nude,"[4] or live performances which are characterized by the exposure of "specified anatomical areas or by specified sexual activities."[5] Moreover, nudity is not even precluded in the defined "sexually oriented businesses." A person is only prohibited from appearing in a state of nudity "while engaged in any live performance on the premises" of such an establishment. § VII(b) (App. 110). Accordingly, only nudity that occurs as part of expressive activities is criminally proscribed, and waitresses, for example, can appear fully nude as long as they are not "engaged in any live performance. . . . " The same applies to the "no physical contact" provision. § VII(d) (App. 110).

Upon being charged, Mr. Jameson immediately challenged Ord. 2000-4 in the McCracken District Court as being unconstitutional on its face and as applied to him under both the Federal and State Constitutions. One of the primary claims that Mr. Jameson raised was to argue that, under *United States v. O'Brien*, 391 U.S. 367, 377 (1968), the Ordinance did not further an important or substantial governmental interest. Specifically, he challenged the assertion that the enactment of Ord. 2000-4 was justified based upon a concern of the "adverse

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[3] Given that Ord. 2000-4 bans nude entertainment (§ VII(b), App. 110), it is then somewhat quizzical that it then attempts to regulate that which it bans.

[4] The term "semi-nude" is defined as the showing of the "female breast below a horizontal line across the top of the areola at its highest point or the showing of the male or female buttocks. This definition shall include the entire lower portion of the human female breast, but shall not include any portion of the cleavage of the human female breast, exhibited by a dress, blouse, skirt, leotard, bathing suit, or other wearing apparel provided the areola is not exposed in whole or in part." Ord. 2000-4 § II(17) (App. 104).

[5] These phrases are defined in § II(21) and (22). *See* App. 105.

secondary effects" of adult entertainment establishments. In that regard and over the general objection of the Commonwealth, the state district court conducted an evidentiary hearing in which both parties had an opportunity to present evidence. Mr. Jameson presented *uncontradicted* evidence that he contended established that the adult entertainment businesses in McCracken County did not have a negative effect upon the County. Rather than contest that evidence, the County chose to stand upon the legislative preambles as set forth in the Ordinance.

Those preambles state that the supposed reason for the County to enact these regulations was because adult businesses "have a deleterious effect on both the existing businesses around them and the surrounding residential areas adjacent to them, ***causing increased crime and a down-grading of property values. . . .***" App. 95-96 (emphasis added). Section (I)(b) sets forth the sole "evidentiary" basis for those claims, and states:

> Based on evidence concerning the adverse secondary effects of adult uses on the community presented in reports made available to the Fiscal Court, and on findings incorporated in the cases of *City of Renton v. Play Time Theaters, Inc.*, 475 U.S. 41 (1986), *Young vs. American Mini Theaters*, 427 U.S. 50 (1976), and *Barnes v. Glen Theater, Inc.*, 501 U.S. 560 (1991), and on studies in other communities including, but not limited to, Phoenix, Arizona; Minneapolis, Minnesota; Houston, Texas; Indianapolis, Indiana; Amarillo, Texas; Garden Grove, California; Los Angeles, California; Whittier, California; Austin, Texas; Seattle, Washington; Oklahoma City, Oklahoma; Cleveland, Ohio; and Beaumont, Texas; and also on findings from the report of the Attorney General's Working Group on the regulation of

> sexually oriented businesses, (June 6, 1989, State of Minnesota), the Fiscal Court finds [that specified adverse effects are caused by adult entertainment businesses]. . . .

App. 97 (clarification added). The legislative preambles go on to state that based upon this information, the Fiscal Court (the legislative body of McCracken County) finds that various health risks can be associated with certain types of adult businesses. § I(b)(1)-(12) (App. 97-99).[6]

However, at no time did the Commonwealth ever place any of the "reports" and "studies" identified in these legislative preambles into evidence before the McCracken District Court, nor have these materials been included as part of the appellate record at any point. Accordingly, neither the state district court nor any of the three subsequent reviewing courts could have reviewed those documents in order to determine whether the evidence that Mr. Jameson submitted in the trial court successfully rebutted the conclusory statements set forth in the legislative preambles.

In any event, in an attempt to refute this so-called governmental "evidence," Mr. Jameson first addressed the assertion that adult uses caused increases in crime by

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[6] The only regulatory provisions in Ord. 2000-4 that the legislative preambles attempt to specifically connect to furthering the interest of reducing these health problems are the following: "Removal of doors on adult booths and requiring sufficient lighting on premises with adult booths advances a substantial governmental interest in curbing the illegal and unsanitary sexual activity occurring in *adult theatres*." § I(b)(15) (App. 99) (emphasis added). That conclusion, however, is irrelevant to the provisions that Mr. Jameson was charged with violating.

calling as a witness Brent Stringer, Acting Chief Dispatcher at Paducah/McCracken County E-911 Communications. Mr. Stringer testified about a series of "911" records that he had gathered in response to a subpoena issued by counsel for Mr. Jameson regarding criminal activity at two adult businesses and two nearby non-adult nightclubs. These records comprised of calls that his office had received from these locations, activities that were self-initiated by a police officer, and reports concerning police undercover investigations, and emanated from the City of Paducah, the McCracken County Sheriff's Department, and other administrative services.

Mr. Stringer identified and filed, as an exhibit with the state district court, all such records between October 1, 1999, to October 16, 2001, at "Playhouse" (an adult entertainment establishment), at *Regina's* (the adult business in which the Petitioner was employed), at "Big Kahuna" (a non-"adult" nightclub), and at "Ginger & Pickles" (another non-"adult" nightclub). Based upon these records, he testified that police activity at Ginger & Pickles and the Big Kahuna – those being the *non-adult* establishments in fairly close proximity to the adult cabarets – had "quite a bit more activity" than the adult entertainment venues. Succinctly put, his testimony demonstrated that crime was significantly ***lower*** at adult cabarets as compared to similar non-adult nightclubs in McCracken County. Mr. Stringer also stated that based upon the records from his department, *Regina's* and Playhouse had *no reports concerning crimes of a sexual nature or drug activity* during the same time period.

Further, Mr. Jameson established that the property values on the "Southside of Paducah," an area containing adult businesses including Playhouse and *Regina's*, have

not been degraded as is claimed – in the legislative preambles – to occur. George Wiley, a well-known realtor in the Paducah/McCracken County area for over 45 years, testified (by way of deposition) that the property values on the Southside located near the two adult businesses continued to remain relatively high, and were indeed rising. In fact, Mr. Wiley stated that in recent years the property values on the Southside of McCracken County near the adult uses "have gone extreme."

Specifically, Mr. Wiley testified in regard to a number of sales transactions that were clustered in the Southside. He submitted a map as an exhibit that identified the location of *Regina's*, and ten secondary properties on Clark's River Road (the road on which *Regina's* was located) that had recently been sold. Mr. Wiley also submitted an exhibit that detailed the respective selling prices of those ten secondary properties. One of these properties was actually located directly next door to *Regina's,* and another was situated across the street from that adult business. Mr. Wiley observed that the property values near and surrounding *Regina's* had "increased tremendously."

In addition, Mr. Jameson established, without contradiction, that there was no evidence that employees of "sexually oriented businesses" engaged in a "higher incidence of certain types of illicit sex." *Cf.*, Ord. 2000-4, § (I)(b)(2). He presented, as discussed above, unrebutted evidence that within a two year period, there were no sexually-related crime records for either Playhouse or *Regina's*. Mr. Jameson also presented testimony from a manager of one adult business in McCracken County who commented that no illicit sexual activities occur at the facility. Also testifying was Joann Warner, the owner of the

Playhouse in Paducah and three other adult businesses, who stated, among other things, that she was not aware of any sexually transmitted disease problems in her Paducah club. In fact, she testified, in detail, to the cleaning and sanitization procedures of their club, and in particular the bathrooms and dressing room areas.

The Commonwealth presented *absolutely no evidence* to rebut Mr. Jameson's proofs. Instead, it relied exclusively on the legislative preambles to Ord. 2000-4. Again, the secondary effects materials identified in those preambles were ***not*** submitted as evidence before the trial court.

Irrespective, on May 31, 2002, the McCracken District Court entered an order denying Mr. Jameson's motion to declare Ord. 2000-4 unconstitutional. App. 89-90. He then entered a Conditional Guilty Plea and Final Judgment/ Order of Sentencing on July 2, 2002, specifically reserving his right to appeal the court's order. App. 88.

Mr. Jameson then appealed his conviction to the McCracken County Circuit Court, which affirmed the decision of the district court on April 9, 2003. App. 84-87. Pursuant to the granting of an application for discretionary review filed by Mr. Jameson, the Kentucky Court of Appeals entered a ruling on August 6, 2004, affirming in part, vacating in part, and remanding for further proceedings. App. 56-83. Specifically, the appellate court found that pursuant to this Court's decision in *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425 (2002), which had been issued *subsequent* to the trial court proceedings below, Mr. Jameson's evidence had, indeed, "cast direct doubt" upon McCracken County's "secondary effects" justification for the enactment of Ord. 2000-4. Accordingly, and again pursuant to this Court's decision in *Alameda*

Books, the Court of Appeals remanded to permit the Commonwealth an opportunity to present evidence in order to re-establish a justification for the enactment of the McCracken County Ordinance. App. 76-77.

The Commonwealth filed a Petition for Reconsideration, which was denied on October 13, 2004. It then filed a Petition for Discretionary Review to the Kentucky Supreme Court, which was granted.

The Supreme Court of Kentucky began it's published opinion with an analysis of the secondary effects doctrine and related First Amendment jurisprudence, although noting that "*[t]his task is complicated by the fact that, to date, there have been no clear majority standards formulated for evaluating nudity ordinances given that almost all of the decisions in this area were decided by plurality opinions.*" *Commonwealth of Kentucky v. Jameson*, 215 S.W.3d 9, 15 (Ky. 2007) (emphasis added) (App.10). The court then, without ever having the supposedly relied-upon secondary effects "reports" and "studies" in the record before it, concluded that Mr. Jameson's evidence was insufficient to meet the "heavy burden" of casting "direct doubt" on the legislative judgment. *Id.* at 32, 36, *citing Fantasyland Video v. County of San Diego*, 373 F.Supp.2d 1094, 1110 (S.D. Cal. 2005) (App. 45, 53-54). It therefore reinstated the prior holding of the state district court regarding the constitutionality of the Ordinance. *Jameson*, 215 S.W.3d at 36 (App. 54).

Mr. Jameson filed a Petition for Rehearing predicated, in large part, upon the conflict between the Kentucky Supreme Court's ruling and a recent decision of the Tenth Circuit *Doctor John's v. City of Roy*, 465 F.3d 1150 (10th Cir. 2006), where that court had reversed a ruling

granting summary judgment in favor of the City of Roy, Utah, on a constitutional challenge to an adult business ordinance, and remanded for further proceedings because, among other reasons, the court was not convinced that the district court actually had in evidence the claim-to-have-been-relied-upon secondary effects materials.[7] The Kentucky Supreme Court denied that petition in an order dated March 22, 2007. App. 91.

This Petition follows.

REASONS FOR GRANTING THE WRIT

I. THE HIGHLY-FRACTURED NATURE OF THIS COURT'S PLURALITY OPINIONS REGARDING THE "SECONDARY EFFECTS" DOCTRINE HAS LED TO SIGNIFICANT CONFUSION IN THE LOWER COURTS.

In *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), this Court declared that the enactment of zoning ordinances directed at "adult" businesses could be justified by the "secondary effects" of such establishments. These laws would be declared constitutional if they were "designed to serve a substantial governmental interest and do not unreasonably limit alternative avenues of communication." *Id.* at 47. Since *Renton*, however, this

[7] The Tenth Circuit's decision in *Doctor John's* was issued shortly before the Kentucky Supreme Court handed down its ruling in Mr. Jameson's case. After the ruling in *Doctor John's* but before the Kentucky Supreme Court issued its opinion, Mr. Jameson filed a motion to be able to submit the Tenth Circuit case in *Doctor John's* as a supplemental authority. The Kentucky Supreme Court *denied* that motion. App. 55.

Court's decisions regarding the application, and indeed expansion, of the "secondary effects" doctrine have – as recognized by the Kentucky Supreme Court here – comprised of a trio of highly-fractured plurality opinions: *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991); *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000) ("*Pap's II*"); and *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425 (2002).

The pluralities in *Barnes* and *Pap's II* determined that the constitutionality of nudity prohibitions should be evaluated pursuant to the intermediate scrutiny test for symbolic speech set forth in *United States v. O'Brien*, 391 U.S. 367 (1968), which analyzed: 1) Whether the regulation at issue is within the government's constitutional power; 2) whether the regulation furthers an important or substantial governmental interest; 3) whether the governmental interest is unrelated to the suppression of free expression; and 4) whether the incidental restriction on alleged First Amendment freedom is no greater than is essential to the furtherance of that interest. *Id.* at 377. Yet, lower courts have had great difficulty in discerning how these three plurality rulings are to be applied.

In attempting to employ the test of *Marks v. United States*, 430 U.S. 188, 193 (1977) (the "holding" of a plurality decision "may be viewed as that position taken by those Members who concurred in the judgment on the narrowest grounds"), a number of courts, including the Kentucky Supreme Court here, have recently devoted entire portions of their opinions just trying to decipher what these split decisions mean. *See, e.g.*, *Jameson*, 215 S.W.3d at 21-27 (App. 23-36); *Peek-A-Boo Lounge of Bradenton, Inc. v. Manatee County*, 337 F.3d 1251, 1259-64 (11th Cir. 2003), *cert. denied*, 541 U.S. 988 (2004); *Ben's Bar, Inc. v. Village*

of Somerset, 316 F.3d 702, 717-22 (7th Cir. 2003); and *SOB, Inc. v. County of Benton*, 317 F.3d 856, 860-64 (8th Cir. 2003), *cert. denied*, 540 U.S. 820 (2003). *See also Pap's A.M. v. City of Erie*, 719 A.2d 273 (Pa. 1998) ("*Pap's I*") (attempting to determine the holding of *Barnes*). And, courts have also noted the difficulty in applying *Marks* to these decisions when there is no one opinion that can be considered to express the consensus of a majority of Justices. *See, e.g., Triplett Grille, Inc. v. City of Akron*, 40 F.3d 129, 134 (6th Cir. 1994). This has resulted in conflicting rulings below in regard to both the government's burden of justifying such laws and the type of evidence that is necessary to successfully challenge such claims.

As noted by this Court in regard to the governmental interest prongs of *Renton/O'Brien*, before enacting a secondary effects-based law a city or state need not conduct new studies or produce evidence independent of that already generated by other municipalities in regard to such perceived problems, "so long as whatever ***evidence*** the [government] relies upon is ***reasonably believed to be relevant*** to the problem that [it] addresses." *Renton*, 475 U.S. at 51-52 (clarification and emphasis added). But how a court determines if this standard is met is not self-apparent (this is particularly exemplified here, where that "evidence" was never even presented to the reviewing courts).

In fact, in rejecting – as a result of this confusing body of case law – this Court's secondary effects jurisprudence as a basis for interpreting its State's free speech rights, the Pennsylvania Supreme Court observed that it is "notable that the five Justices in the U.S. Supreme Court [in *Pap's II*] who agreed that the *O'Brien* test applied ***could not agree upon the precise evidentiary showing***

which would be required to satisfy that test." *Pap's A.M. v. City of Erie*, 812 A.2d 591, 609-10 (Pa. 2002) ("*Pap's III*") (clarification and emphasis added). *See also Heideman v. South Salt Lake City*, 348 F.3d 1182, 1197 (10th Cir. 2003) ("The standards for the *quantity and nature* of the empirical evidence needed to uphold a city ordinance based on the negative secondary effects of sexually oriented speech in general, or nude dancing particular, are *continuing to evolve*") (emphasis added). And, legal commentary has been critical in regard to the lack of clarity of the Court's decisions on these issues.[8]

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[8] *See, e.g.*, Roger Enriquez, Jeffrey M. Cancino & Sean P. Verano, *A Legal and Empirical Perspective on Crime and Adult Establishments: A Secondary Effects Study in San Antonio, Texas*, 15 Am. U.J. Gender Soc. Pol'y & Law 1, 39 (2006) ("The post-Alameda jurisprudence makes it clear that courts are struggling with the issue of 'quantum and quality' of evidence necessary to establish an association or link between sexually oriented businesses and negative secondary effects"); Christy A. Fisher, *Sixth Annual Review of Gender and Sexuality Law: I. Constitutional Law Chapter: Nude Dancing*, 6 Geo. J. Gender & Law 335 (2005) ("Restrictions on nude dancing implicate the First and Fourteenth Amendments of the U.S. Constitution. Courts have issued vague and contradictory opinions on the topic, make the conflict between constitutional protections of erotic express and public decency laws even more confusing"); Maggie Sklar, *Constitutional Law Chapter: Nude Dancing*, 5 Geo. J. Gender & Law 95-96 (2004) ("The lack of a clear majority regarding the reasoning of the case and application of the standard used in Pap's A.M. has let to some inconsistency in the lower courts"); and Christopher J. Andrew, *The Secondary Effects Doctrine: The Historical Development, Current Application, and Potential Mischaracterization of an Elusive Judicial Precedent*, 54 Rutgers L. Rev. 1175, 1212 (2002) ("Alameda Books (sic), on the other hand, represents a missed opportunity for the court to come to a decision on the intricacies of the secondary effects analysis, which would be useful once the Court begins applying the analysis consistently outside the area of adult entertainment regulations. It seems clear that the evidentiary burdens and legislative motivations are not entirely clear from the fractured nature of many of the recent secondary effects

(Continued on following page)

This confusion has lead appellate courts to disagree, for example, on whether the generally relied-upon secondary effects reports examining adults bookstores and live entertainment venues can be used to justify regulations of "take out" only facilities where there is no viewing of adult entertainment on the premises. *Cf. Encore Videos, Inc. v. City of San Antonio*, 330 F.3d 288, 293-95 (5th Cir. 2003), *cert. denied*, 540 U.S. 982 (2003), and *World Wide Video, Inc. v. City of Tukwila*, 816 P.2d 18, 21 (Wash. 1991), *cert. denied*, 503 U.S. 986 (1992) (they cannot); *with H And A Land Corp., v. City of Kennedale, Texas*, 480 F.3d 336, 339-341 (5th Cir. 2007) (note that it distinguishes the same circuit decision in *Encore Videos*); *Z.J. Gifts, L.L.C. v. City of Aurora*, 136 F.3d 683, 687 (10th Cir. 1998), *cert. denied*, 525 U.S. 868 (1998), and *ILQ Investments, Inc. v. City of Rochester*, 25 F.3d 1413, 1418 (8th Cir. 1994), *cert. denied*, 513 U.S. 1017 (1994) (they can). And, there is even a conflict in the circuits concerning whether the secondary effects "reliance" component of *Renton* can be used to legitimize the extension of regulations so that they apply to a business that presents "adult" entertainment on only a *single* occasion. *Cf. BZAPS, Inc. v. City of Mankato*, 268 F.3d 603, 606-07 (8th Cir. 2001), *cert. denied*, 536 U.S. 904 (2002) (yes); *with Tollis, Inc. v. San Bernardino County*, 827 F.2d 1329, 1333 (9th Cir. 1987) (no).

The conflict concerning a litigant's ability to dispute the governmental interest claims underlying a secondary effects-based law is, however, the most problematic. The *theoretical* right to mount such an attack is clearly established. *Pap's II* noted that the business challenging the

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opinions and the different discussions and rationales that are provided throughout these opinions").

law there had been given "ample opportunity to contest the [city] council's findings about secondary effects – before the council itself, throughout the state proceedings, and before this Court." *Pap's II*, 529 U.S. at 298 (clarification added). Later, in *Alameda Books*, the plurality observed – after noting that *Renton* had not set an *initial* high evidentiary bar for municipalities when attempting to justify such laws – that:

> This is not to say that a municipality can get away with *shoddy data or reasoning*. The municipality's evidence must fairly support the municipality's rationale for its ordinance. If plaintiffs fail to ***cast direct doubt*** on this rationale, ***either by demonstrating that the municipality's evidence does not support its rationale or by furnishing evidence that disputes the municipality's factual findings***, the municipality meets the standard set forth in *Renton*.

Alameda Books, 535 U.S. at 438-39 (emphasis added).

However, respectfully, this Court has provided no clear guidance in regard to how a plaintiff may satisfy *either* standard, which has led to conflicting opinions concerning not just the *weight* of evidence that is necessary to "cast direct doubt," but also the form of contradictory evidence that is even *relevant* to meeting these standards.

For example, here, the Kentucky Supreme Court found no apparent relevance in the fact that Acting Chief Dispatcher Stringer observed that non-adult bars had far higher crime records than "adult" liquor-serving establishments in the same area. *Jameson*, 215 S.W.3d at 34-35. App. 50-51. But in *Flanigan's Enter., Inc. v. Fulton County*,

242 F.3d 976 (11th Cir. 2001), *cert. denied*, 536 U.S. 904 (2002), the Eleventh Circuit found it highly relevant, in invalidating an ordinance which prohibited the sale of alcoholic beverages in "adult" businesses based upon a secondary effects challenge, that "the Fulton County Police Study found greater reported crime connected with establishments that served alcohol but did not feature adult entertainment."[9] *Id.* at 986.

In addition, the Kentucky Supreme Court's seeming rejection of the relevance of a lack of localized secondary effects (where, unlike in *Renton*, adult businesses had existed for a period of years), is also in conflict with other rulings.[10] In *Flanigan's Enter.*, 242 F.3d at 986, *Peek-A-Boo Lounge*, 337 F.3d at 1271-1272, and *Daytona Grand v. Daytona Beach* 410 F.Supp.2d 1173, 1184 (M.D. Fla. 2006), for example, the courts determined that expert witness testimony describing localized empirical studies that negated a connection between adverse secondary effects and "adult" businesses can indeed rebut the governmental presumption. In *Flanigan's Enter.*, a *police study* had concluded that there was no correlation between adult entertainment establishments and crime; a real estate

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[9] "The study concluded that, for the time period January 1, 1995, through May 31, 1997, there was no statistical correlation showing an increase in crime at adult entertainment establishments that served alcoholic beverages. Rather, the statistics indicated greater instances of calls for service and reported crime at non-adult entertainment establishments that served alcoholic beverages." *Flanigan's Enter.*, 242 F.3d at 979.

[10] The Kentucky Supreme Court even undercuts its argument in this regard by observing that "evidence of the occurrence, or non-occurrence, of the feared secondary effects will bear on the reasonableness of the legislative belief for the need of such regulation." *Jameson*, 215 S.W.3d at 32. App. 46.

analysis commissioned by adult businesses found no decrease in real estate values; and that latter finding was confirmed by the county's own real estate appraiser. 242 F.3d at 979-80. Based upon *that* evidence, the Eleventh Circuit declared that it was not reasonable for Fulton County to "rely on remote, foreign studies concerning secondary effects when the County's *own current, empirical data* conclusively demonstrated that such studies were not relevant to local conditions." *Id.* at 986 (emphasis added). The Kentucky Supreme Court specifically rejects this line of authority. *Jameson*, 215 S.W.2d at 33. App. 47.

This conflict in the lower courts is also demonstrated by the fact that the Kentucky Supreme Court discounted Mr. Stringer's testimony because he was not qualified as an expert witness,[11] and because his testimony "fails to compare incidents occurring in and around sexually oriented businesses to similarly situated establishments."[12] *Jameson*, 215 S.W.3d at 34-35. App. 50. It also rejected Mr. Wiley's testimony because his materials, the Kentucky Supreme Court contended, failed "to provide any historical or scientific relevance that prices for real estate on the "south side of Paducah" had increased or decreased over time. . . . " *Id.* at 35. App. 51.

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[11] Of course, had Mr Jameson brought in an "expert" witness, that person's bias as a "hired gun" would then have become an issue. These concerns are not raised when a governmental official testifies about police generated records, so it would seem that, if anything, Mr. Stringer's lack of "expert" qualifications would enhance – not detract from – the credibility of his testimony.

[12] Given the discussion above and the fact that Mr. Stringer *directly* compared the crime records between bars that provided "adult" entertainment and those that did not, the meaning of this comment is not entirely clear.

Yet, when adult businesses submit expert testimony (at least outside of the Eleventh Circuit) that meets these standards, that is still often deemed insufficient to "cast direct doubt" upon a secondary effects justification for the enactment of a speech-restrictive law. *See, e.g., G.M. Enter., Inc. v. Town of St. Joseph*, 350 F.3d 631, 635-36, 639 (7th Cir. 2003), *cert. denied,* 543 U.S. 812 (2004) (a local study which established that the surrounding county "[h]ad not experienced any major problems with adult entertainment establishments," an affidavit stating that property values near the club had increased over time, an affidavit which established that the majority of police calls regarding incidents at the club were generated during hours when no nude or semi-nude dance entertainment was offered, and a statement by the local sheriff that the volume of police calls generated by the club was unrelated to nude dancing, was all *irrelevant* as *"[a]lthough this evidence shows that the Board might have reached a different and equally reasonable conclusion regarding the relationship between adverse secondary effects and sexually oriented businesses, it is not sufficient to vitiate the result reached in the Board's legislative process"*); *DiMa Corp. v. Town of Hallie*, 185 F.3d 823, 831 (7th Cir. 1999), *cert. denied*, 529 U.S. 1067 (2000) (the district court "*properly rejected*" expert testimony and other evidence demonstrating that there was in fact no correlation between the plaintiff's establishment being open 24 hours a day and crime because it "merely contradicts other evidence that the Hallie Board ***could*** have reasonably relied upon"); *Gammoh v. City of La Habra*, 395 F.3d 1114, 1126 (9th Cir. 2005), *cert. denied*, 126 S.Ct. 374 (2005) (Ninth Circuit ignored proffered expert testimony that the studies on which the city relied were "flawed and irrelevant" and did not conform to the methodological criteria suggested by

the appellants' expert, as that was "simply not the law"), and *Kentucky Restaurant Concepts, Inc. v. City of Louisville*, 209 F.Supp.2d 672, 679-80 (W.D. Ky. 2002) (evidence challenging the reliability and probativity of the reports which the city relied upon, empirical studies conducted in other municipalities that found no connection between adult uses and adverse secondary effects, and compilation of police data showing no local increase in crime, did not disprove that the enactment of the ordinance may reduce criminal activity) (all emphasis added).

In addition, the Kentucky Supreme Court also criticizes Mr. Jameson for not challenging the veracity of the "studies" and "reports" set forth in the Ordinance preambles that McCracken County contends were relied upon as justification for enacting Ord. 2000-4. *Jameson*, 215 S.W.3d at 33-34. App. 48-49. Yet, the relevance of such a challenge is also the subject of dispute in the lower courts. For example, in *Doctor John's,* 465 F.3d at 1169 n. 24, the Tenth Circuit observed that the mere submission of the article Bryant Paul, Daniel Linz & Bradley Shafer,[13] *Government Regulation of "Adult" Businesses Through Zoning and Anti-Nudity Ordinances: Debunking The Legal Myth of Negative Secondary Effects,* 6 Communication Law and Policy No. 2 (2001), which analyzed the secondary effects reports generally relied upon by municipalities when enacting "adult" business regulations and found them to be seriously and often fatally flawed, might alone cast doubt upon a city's evidence and rationale. But upon remand, the district court dismissed that peer-reviewed published study. *See Doctor John's, Inc. v. City of Roy*,

[13] The latter being the undersigned here.

2007 WL 1302757 (D. Utah). In addition, in *SOB, Inc.*, 317 F.3d at 862-63, the Eighth Circuit found that this article, *plus* testimony that an adult business that had been in operation for eight years had neither caused higher crime rates nor depressed the value of nearby properties, was insufficient. The Seventh Circuit came to basically the same conclusion in *G.M. Enter.,* 350 F.3d at 635-36, 639.

This utter confusion has led two appellate courts to recently state that they simply "will not specify the methodological standards to which [a litigant's] evidence must conform" in order to successfully challenge the stated secondary effects basis for the enactment of a speech-restrictive law. *See City of Chicago v. Pooh Bah Enter., Inc.*, 865 N.E.2d 133, 159, (Ill. 2006), *pet. for cert. filed* (June 4, 2007) (No. 06-1614); and *Gammoh*, 395 F.3d at 1126 (clarification added).

Probably most concerning, however, is the simple fact that the lack of clarity from this Court on these difficult issues permits the government to basically ignore the truth and to enact speech-restrictive regulations based upon falsehoods and "shoddy data or reasoning." In fact, appellate courts are now simply concluding, in light of this hopelessly confusing doctrine, that – as exemplified by the Kentucky Supreme Court here – the *truth* simply does not matter any longer in these type of challenges. *See Jameson*, 215 S.W.3d at 32 (". . . it is *irrelevant* whether the local government is *actually wrong* regarding the extent of all the secondary effects that have actually occurred or may occur in the future") (emphasis added) (App. 45-46). *See also DiMa Corp.*, 185 F.3d at 831 ("*DiMa*'s contradictory evidence would be highly probative *if our task were to discover the objective truth about the effect of* [the plaintiff] *operating in Hallie. But our task*

under the First Amendment is far different") (emphasis and clarification added).

These ominous jurisprudential developments permit the government to impermissibly suppress disfavored – but nevertheless protected – expression predicated upon not only unsubstantiated governmental allegations, but upon, indeed, outright false causal assertions. This is because "adult" businesses do not necessarily engender "adverse secondary effects." Judicial decisions have reached this conclusion,[14] as have a number of recent peer-reviewed journal articles.[15]

This judicial trend, resulting from the fractured nature of the Court's "secondary effects" rulings, is now rendering the second prong of *O'Brien* virtually meaningless; at least outside of the Eleventh Circuit. The protection of First

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[14] *See, e.g.*, *Peek-A-Boo Lounge*, 337 F.3d at 1268; *Flanigan's Enter.*, 242 F.3d at 986; and *Erie Boulevard Triangle Corp. v. City of Schenectady*, 250 F.Supp.2d 22, 32 (N.D.N.Y. 2003).

[15] *See, e.g.*, Daniel Linz, Bryant Paul, Kenneth C. Land, Jay R. Williams & Michael E. Ezell, *An Examination of the Assumption That Adult Businesses Are Associated With Crime In Surrounding Areas: A Secondary Effects Study In Charlotte, North Carolina*, 38 Law & Society Review, No. 1 (2004); Daniel Linz, Bryant Paul & Mike Z. Yao, *Peep Show Establishments, Police Activity, Public Place and Time: A Study of Secondary Effects in San Diego, California*, 43 The Journal of Sex Research 182 (2006) (this publication even containing a methodological critique thereof and a response). Daniel Linz, Mike Z. Yao & Sahara Byrne, *Testing Supreme Court Assumptions in California v. LaRue: Is There Justification for Prohibiting Sexually Explicit Messages in Establishments that Sell Liquor?*, 7 Communication Law Review, 23-53 (2007); and Roger Enriquez, Jeffrey M. Cancino & Sean P. Varano, *A Legal and Empirical Perspective of Crime and Adult Establishments: A Secondary Effects Study in San Antonio, Texas*, 15 Am. U.J. Gender Soc. Pol'y & L. 1 (2006) (non-peer reviewed published study that found no connection between crime rates and live entertainment "adult" businesses).

Amendment rights from governmental erosion warrants clearer direction from this Court on these evidentiary standards, and this petition should, therefore, be granted.

II. THE LACK OF CLARITY FROM THIS COURT HAS RESULTED IN A BODY OF DECISIONS THAT RENDER IT VIRTUALLY IMPOSSIBLE TO CHALLENGE A PURPORTED SECONDARY EFFECTS JUSTIFICATION FOR A LAW THAT RESTRICTS PROTECTED EXPRESSION.

In addition to the observations above which illustrate that what one court says might carry the day, another finds to be irrelevant, the secondary effects doctrine is further muddled because lower courts also disagree in regard to *when* the government needs to "rely" on its secondary effects materials, and *what* secondary effects are relevant to a particular restriction upon expression. This has occurred, in great measure, because of the highly-fractured nature of *Barnes* and the fact that Justice Souter's concurrence is generally considered to be the "holding" of that decision.

In Justice Souter's view, a governmental interest need not be identified at the time of the enactment of a regulation, but may be established later during litigation. *Barnes*, 501 U.S. at 582 ("Our appropriate focus is not an empirical enquiry into the actual intent of the enacting legislature, but rather the existence or not of a ***current*** governmental interest in the service of which the challenged application may be constitutional") (Souter, J., concurring) (emphasis added).

Utilizing *Marks*, numerous courts adopt this precept. *See, e.g., Jameson*, 215 S.W.3d at 22 (App. 24-25); *Deja Vu of Nashville, Inc. v. Metropolitan Government of Nashville and Davidson County, Tennessee*, 274 F.3d 377, 394 n.4 (6th Cir. 2001), *cert. denied*, 535 U.S. 1073 (2002) (appellate court coming up with its own justification for a license disclosure provision even though it did not comport with the "codified" reason for that requirement set forth in the challenged ordinance). *See also Mitchell v. Comm'n on Adult Entertainment Establishments of Delaware*, 10 F.3d 123, 136-37 (3rd Cir. 1993); *Giovani Carandola, Ltd. v. Bason*, 303 F.3d 507, 515 (4th Cir. 2002); *Fantasy Ranch, Inc. v. City of Arlington, Texas*, 459 F.3d 546, 560 (5th Cir. 2006); *DiMa Corp.*, 185 F.3d at 829-30; *Farkas v. Miller*, 151 F.3d 900, 905 (8th Cir. 1998); and *Essence, Inc. v. City of Federal Heights*, 285 F.3d 1272, 1284-285 (10th Cir. 2002), *cert. denied*, 537 U.S. 947 (2002).

Other courts, however, come to the conclusion that in order for a speech-restrictive law to be upheld, the secondary effects record must be made at the time of legislative enactment (in view of *Renton*'s command that the government must "rely" upon evidence reasonably believed to be relevant to the problems that it is attempting to address). *See, e.g., White River Amusement Pub, Inc. v. Town of Hartford*, 481 F.3d 163, 171-172 (2d Cir. 2007), and cases cited therein; and *Illusions-Dallas Private Club, Inc. v. Steen*, 482 F.3d 299, 312-315 (5th Cir. 2007). *See also G.Q. Gentlemen's Quarters, Inc. v. City of Lake Ozark*, 83 S.W.3d 98, 102-103 (Mo. App. 2002) (court was unwilling "to presume that the City enacted [a prohibition of public nudity in establishments where liquor is served] to prevent negative secondary effects," and therefore concluded

that the "City had the heavy burden of justifying the ordinance under strict scrutiny") (clarification added).

Accordingly, in those jurisdictions that allow post-enactment secondary effects substantiation, a litigant can appropriately "cast doubt upon" the secondary effects as may be articulated in a bill's legislative preambles but nevertheless find himself or herself losing the constitutional challenge when another secondary effect is used in court to justify the law. *See, e.g.*, *SOB, Inc.*, 317 F.3d at 862-63 (Eighth Circuit describing the limited governmental concerns in the legislative preambles, and ignoring submitted studies of crime and property values because the plaintiffs' "local evidence addressed only two adverse secondary effects, property values and crime in the vicinity of an adult entertainment establishment. These are issues particularly relevant to zoning. A ban on live nude dancing, on the other hand, ***may address*** other adverse secondary effects, such as the likelihood that an establishment whose dancers and customers routinely violate long-established standards of public decency will foster illegal activity such as drug use, prostitution, ***tax evasion and fraud***"[16]); and *World Wide Video of Wash. Inc. v. City of Spokane*, 368 F.3d 1186, 1190, 1195 (9th Cir. 2004) (adult business zoning ordinance challenged with evidence that included a declaration – together with supporting data – that the adult businesses in Spokane neither contributed to the depreciation of property values nor

[16] *But cf.*, *J&B Entertainment, Inc. v. City of Jackson*, 152 F.3d 362, 374 (5th Cir. 1998) (Fifth Circuit concludes that there was no reason to believe that the consideration of certain secondary effects for the adoption of a zoning ordinance was relevant to the enactment of an anti-nudity provision).

resulted in increased calls for police service, with the Ninth Circuit concluding that the plaintiff had not succeeded in "casting direct doubt" because "pornographic" ***litter*** was a sufficient governmental justification for the enactment of the ordinances in question[17]) (all emphasis added).

The lack of clarity from this Court on these issues has led to a point where there appears to be, outside of the Eleventh Circuit, little or no scrutiny given to whether an articulated governmental problem can truly be tied to "adult" entertainment, and that, irrespective of this Court's comments in *Pap's II* and *Alameda Books*, there really is no ability to challenge the mere *assertion* of the governmental interest of adverse secondary effects. For example, here, the Kentucky Supreme Court states that the governmental interest of limiting the spread of sexually transmitted disease justifies the Ordinance – which includes an hours-of-operation limitation – without ever explaining this relationship or without ever putting the Commonwealth to the task of making this connection. *See also White River Amusement*, 481 F.3d at 171 (" . . . a city need not prove that such a link [between a secondary effect and adult businesses] exists or prove that its ordinance will be effective suppressing secondary effects") (clarification added). *But cf., Illusions-Dallas Private Club,* 482 F.3d at 312 ("The inquiry into whether a statute furthers a substantial governmental interest is divided

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[17] But decisions of this Court seem to cast doubt upon whether "litter" can be used as a basis to suppress expression. *See Schneider v. New Jersey*, 308 U.S. 147, 162 (1939); *Members of City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 808-09 (1984); and *Ward v. Rock Against Racism*, 491 U.S. 781, 800 n.7 (1989).

into two parts. . . . First, a substantial governmental interest *must actually exist*. . . . Second, the statute *must further* that interest") (emphasis added, citations omitted).

The culmination of this judicial trend was recently reached in *Sensations, Inc. v. City of Grand Rapids*, 2006 U.S. Dist. LEXIS 77159, where the City of Grand Rapids filed a motion to dismiss under Fed.R.Civ.P. Rule 12(c) against the entirety of a challenge against the municipality's adult business licensing and regulatory ordinance, including the plaintiffs' secondary effects challenge. In citing to and relying upon *Deja Vu of Nashville, Inc. v. Metropolitan Government of Nashville & Davidson County*, 466 F.3d 391 (6th Cir. 2006), *cert. denied*, 127 S.Ct. 2088 (2007), which held that *discovery is not allowed in regard to a secondary effects attack*, the district court concluded that where "the local ordinance is based on controlling cases finding evidence of secondary effects and approving identical restrictions, discovery may not properly be used to undermine the conclusion reached by those controlling courts." *Id.* at *27. Without then even permitting the plaintiffs to mount a secondary effects challenge, the district court there simply granted a motion to dismiss based upon the pleadings.

This is the direction in which courts are now heading in light of the fractured nature of this Court's opinions on these issues, where the claim of adverse secondary effects being the justification for the enactment of speech-restrictive laws becomes irrefutable, irrebuttable, and incontestable. This could not have been what this Court contemplated in *Pap's II* and *Alameda Books*, and the petition should therefore be granted.

CONCLUSION

For the reasons set forth above, Petitioner respectfully requests this Honorable Court grant the petition for a writ of certiorari.

Dated: June 20, 2007

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Supreme Court of Kentucky.
COMMONWEALTH OF **KENTUCKY**, Appellant,
v.
Edward Green **JAMESON**, Appellee.
No. 2004-SC-000983-DG.

Nov. 22, 2006.
Rehearing Denied March 22, 2007.

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Opinion of the Court by Justice SCOTT.

On April 24, 2000, the McCracken County Fiscal Court adopted and published Ordinance No.2000-4, "An Ordinance Providing Regulation of Sexually Oriented Businesses and Their Employees." The ordinance provides, in pertinent part, that employees (i.e. nude dancers) of sexually oriented businesses wear the *de minimis* covering of "pasties" and a "G-string,"[1] and that no sexually oriented businesses remain open at any time between 1 a.m. and 6 a.m.[2] The ordinance also prohibits entertainers and employees of such a business from having any physical contact with a patron during any performance.[3] Any person who violates the provisions of the ordinance would be guilty of a misdemeanor and subject to a fine of not less than one hundred dollars nor more than five hundred dollars, or be imprisoned in the county jail for not more than twelve months or both.[4]

The Preamble to the ordinance states that its purpose is "to promote health, safety, and general welfare of the citizens of [McCracken] County, and to establish reasonable and uniform regulations relating to sexually oriented businesses." By its terms, the ordinance seeks to prevent any negative secondary effects generally associated with sexually oriented businesses, *viz.,* increased crime, lowered property values, and a deleterious effect on surrounding businesses. The ordinance adopts the findings of such adverse secondary effects presented in reports made available to the Fiscal Court, and on findings incorporated

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[1] McCracken County Ordinance, No.2000-4, Section VII(b).

[2] *Id.* at Section IV(e).

[3] *Id.* at Section VII(d).

[4] *Id.* at Section XI.

in the cases of *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986), *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 96 S.Ct. 2440, 49 L.Ed.2d 310 (1976), and *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 111 S.Ct. 2456, 115 L.Ed.2d 504 (1991), as well as on studies from other communities.

Shortly after the passage of the ordinance, Appellee Jameson was cited for operating his adult cabaret[5] (Regina's II) in violation of several of the provisions of the ordinance. Specifically, Jameson was cited for violating the hours of operation requirement, allowing total nudity by dancers, and allowing physical contact between nude dancers and patrons.

Jameson filed a motion in McCracken District Court to declare the ordinance unconstitutional. On October 18, 2001, an evidentiary hearing was held during which several witnesses testified on his behalf. The first witness, Brent Stringer, a dispatcher with the Paducah/McCracken E-911 Communication Services, testified that E-911 had received numerous calls from Regina's II, amounting to approximately two and one-half pages from that location alone, during the 2001 calendar year up to the date of the hearing. Stringer acknowledged, however, that he had received more calls from two nearby non-sexually oriented

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[5] As the Court of Appeals notes, there is no dispute that Regina's II is an "adult cabaret" as that term is defined in Section II(3) of McCracken County Ordinance No.2000-4: "'Adult Cabaret' means a night club, bar, restaurant, or similar commercial establishment which regularly features: (a) Persons who appear in a state of nudity or semi-nude; or (b) Live performance which are [sic] characterized by the exposure of 'specified anatomical areas' or by 'specified sexual activities'; or (c) Films, motion pictures, video cassettes, slides or other photographic reproductions which are characterized by the depiction or description of 'specified anatomical areas' or 'specified anatomical areas.'"

businesses, *i.e.* nightclubs, during that same period.[6] Stringer also testified that not all criminal investigations are reported on the E-911 call sheets, such as undercover investigations. However, as the Commonwealth points out, Stringer did not testify concerning the number of patrons that visit any of the establishments in a given time period, nor did he testify concerning the total revenues of any of the businesses. Significantly, Stringer did not testify as to whom, if anyone, would typically call 911 to report illicit sexual behavior occurring on the premises of this adult business. It does seem unlikely that one participating in illicit sexual behavior at such a business would call 911 and complain about it. Likewise, Jameson did not attempt to establish that Stringer was an expert in criminology.

Other witnesses, including Melissa Meyer, a day shift manager at The Playhouse, and Joanne Warner, owner of The Playhouse, also testified.[7] Specifically, the women testified about the "rules" in place at The Playhouse, which, as they testified, were in place to keep the patrons and employees safe. Among these were rules against drugs, acts "of any sexual nature," prostitution, and the requirement that "everything is sanitized." Warner also emphasized that her establishment had a rule prohibiting patron-dancer touching. Although Warner testified that such rules were in place at The Playhouse, she acknowledged she had recently called the police to report a man engaging in indecent exposure on the premises.

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[6] Jameson's counsel subpoenaed the call logs relating to the non-sexually oriented businesses in an attempt to discredit the findings of the fiscal court upon which the ordinance was founded.

[7] Joanne Warner was also cited for misdemeanor violations of the ordinance for activities occurring at The Playhouse, another sexually oriented business located in McCracken County.

Warner also testified that although she had heard of incidents of sexual acts between patrons and dancers at other clubs, she insisted the rules at The Playhouse specifically prohibited such acts. At no point, though, did Warner or Meyer testify that requiring dancers to wear pasties and a G-string would not further the local government's interest in preventing illicit sexual conduct between patrons and dancers. Moreover, Jameson did not offer similar evidence of "self-regulation" at Regina's II.

Finally, a local realtor, George Wiley, testified via deposition as to several commercial real estate transactions that he had been involved with on the "south side of Paducah"[8] over the previous several years. Wiley opined that the value of "south side" real estate had "increased tremendously" over the past ten to fifteen years based on "what it's selling for now" and "the fact that it wasn't selling" in the time period prior to the previous fifteen years. However, he also admitted that much of this increase in general was due to the recent presence of a Wal-Mart in the area.

On May 31, 2002, the McCracken District Court, having conducted several evidentiary hearings and having heard the arguments of counsel, denied Jameson's motion to declare the ordinance unconstitutional. Applying the United States Supreme Court's holding in *Renton, supra,* as well as Kentucky Court of Appeals' holding in *Restaurant Ventures, LLC v. Lexington-Fayette Urban County Government,* 60 S.W.3d 572 (Ky.App.2001), the court found

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[8] The "south side of Paducah" is an undefined geographical area in which Regina's II, as well as several other non-sexually oriented businesses, *i.e.* nightclubs, and other businesses and residences are located.

that McCracken County was entitled to rely upon the studies it compiled and cited concerning the negative secondary effects of sexually oriented businesses. The court also concluded that Jameson supplied no authority demonstrating that the Kentucky Constitution affords greater protection for the nude dancing activities at Regina's II, and therefore rejected the state constitutional claims.[9]

On April 9, 2003, the McCracken Circuit Court affirmed the district court, noting that McCracken County did not need to "conduct new studies or produce evidence independent of that already generated by other municipalities to demonstrate the problem of secondary effects" stemming from activities at sexually oriented businesses. Additionally, the circuit court concluded that whatever evidence the municipality relies upon, that evidence is reasonably believed to be relevant to the problem that the municipality addresses. The court further found that the ordinance was not vague or overbroad in its application, that it was not arbitrary or discriminatory in light of federal or Kentucky constitutional standards, and that the administrative inspection provision imposed on Regina's II fell under the warrantless search exception to the Fourth Amendment of the United States Constitution in relation to "closely regulated" businesses.

Jameson then appealed to the Kentucky Court of Appeals, and on August 6, 2004, that court affirmed in part, vacated in part, and remanded the case for further

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[9] Those who have read and are familiar with the Debates of the 1890 Kentucky Constitutional Convention could only imagine the humorous confrontation which would have occurred had these rights been asserted at the convention.

proceedings. In its opinion, the Court of Appeals noted that "as between totally nude exotic dancing and exotic dancing that is accompanied by pasties and G-strings, we hold that any muting of the erotic message that occurs by prohibiting the totally nude exotic dancing is *de minimis.*" Slip Op. at 18. It also acknowledged that "when enacting ordinances aimed at combating the negative, secondary effects associated with sexually-oriented businesses, cities are entitled to rely on studies from other municipalities and even prior court precedents which tend to establish the link between sexually-oriented businesses and those negative, secondary effects." Slip Op. at 21 (citing *City of Erie v. Pap's A.M.,* 529 U.S. 277, 296-97, 120 S.Ct. 1382, 1395, 146 L.Ed.2d 265 (2000)).

However, the Court of Appeals found that Jameson's "unrebutted" evidence before the district court tended to "cast doubt" on the fiscal court's pre-enactment justification for Section VII(b)[10] of the ordinance. In vacating the ruling of the circuit court, the Court of Appeals, citing *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 122 S.Ct. 1728, 152 L.Ed.2d 670 (2002) held that "as *Alameda Books* makes clear, if a party challenging the regulation casts doubt on the city's pre-enactment rationale, the burden shifts back to the city to proffer supplemental evidence justifying the regulation." Slip Op. at 22. The court also relied on *Peek-A-Boo Lounge of Bradenton, Inc. v. Manatee County, Florida,* 337 F.3d 1251, 1264-65 (11th Cir.2003), wherein the Eleventh Circuit noted that "[t]he significance of *Alameda Books* is that it clarifies how the

[10] Section VII(b) provides: "No person shall appear nude or in a state of nudity while engaged in any live performance on the premises of any sexually oriented business."

court is to interpret the third step of the *Renton* analysis as well as the second prong of the *O'Brien* test."[11] The Court of Appeals thus remanded the case back to the McCracken District Court for an evidentiary hearing "to determine whether the fiscal court can proffer supplementary evidence indicating that Section VII(b)'s ban on totally nude dancing furthers a substantial governmental interest *in McCracken County* without unreasonably limiting alternative avenues of communication." Slip Op. at 24 (citing *Peek-A-Boo Lounge,* 337 F.3d at 1273) (emphasis in original).

It is from this ruling that the Commonwealth appeals to this Court. Accordingly, the only issue before this Court is whether the Court of Appeals erred as a matter of law In concluding that Appellee Jameson provided evidence sufficient to cast "direct doubt" on the rationale proffered by the McCracken Fiscal Court for Ordinance No.2000-4 in order to shift the burden to the municipality to supplement the record with evidence renewing support for its rationale in enacting the ordinance. For the reasons set forth herein, we find that the Court of Appeals erred as a matter of law, and thus we reverse the Court of Appeals and reinstate the judgment of the district court.

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[11] The Court of Appeals is referring to the second prong of the four-prong test set forth in *United States v. O'Brien,* 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968), which provides that "a government regulation is sufficiently justified (1) if it is within the constitutional power of the Government; (2) if it furthers an important or substantial governmental interest; (3) if the governmental interest is unrelated to the suppression of free expression; and (4) if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." *Id.* at 377, 88 S.Ct. at 1679. A detailed discussion of *O'Brien* follows in the Analysis portion of this opinion.

ANALYSIS

A. Standard of Review.

Our review of this matter requires this Court to interpret an ordinance adopted by the McCracken County Fiscal Court as it regulates sexually oriented businesses in that county. Since this review involves the construction and application of Ordinance No.2000-4, it is thus a matter of law, and "may be reviewed *de novo.*" *Bob Hook Chevrolet Isuzu, Inc. v. Com., Transp. Cabinet,* 983 S.W.2d 488, 490 (Ky.1998).

B. History and development of First Amendment jurisprudence as it relates to sexually oriented businesses.

The case at bar involves an ordinance directed at preventing the negative secondary effects generally associated with sexually oriented businesses. Specifically, McCracken County Fiscal Court adopted Ordinance No.2000-4 in an effort to protect the health, safety and welfare of the citizens of McCracken County and to establish "reasonable and uniform regulations relating to sexually oriented businesses." Based in part on United States Supreme Court precedent, rationales offered by various other jurisdictions, and studies conducted in other communities, the ordinance purports to target negative secondary effects without the intent or effect of restricting or denying access by adults to sexually oriented materials or of imposing a limitation or restriction on the content of any communicative materials.

Prior to determining whether or not the Court of Appeals correctly determined that Jameson was successful in casting direct doubt on the rationale or findings of fact

proffered by the fiscal court, a thorough analysis of the secondary effects doctrine and First Amendment jurisprudence as it relates to sexually oriented businesses and as developed by the United States Supreme Court is necessary. This task is complicated by the fact that, to date, there have been no clear majority standards formulated for evaluating nudity ordinances given that almost all of the decisions in this area were decided by plurality opinions.

Furthermore, the Supreme Court "has occasionally borrowed specific doctrines developed in one category of case[s] to apply to the other." *Peek-A-Boo Lounge,* 337 F.3d at 1255-56. As will become apparent, the standards that have developed provide only a framework for courts to apply in determining whether a regulation, aimed at preventing identified negative secondary effects, impermissibly encroaches on the expressive message purportedly inherent in erotic dancing. Subsequently, the Supreme Court has found that this manner of "speech" is only marginally protected by the First Amendment to the United States Constitution. *See, e.g., California v. LaRue,* 409 U.S. 109, 118, 93 S.Ct. 390, 34 L.Ed.2d 342 (1972) (Rehnquist, J. majority) (finding that "at least some of the performances to which these regulations address themselves are within the limits of the constitutional protection of freedom of expression"), *overruled on other grounds by 44 Liquormart, Inc. v. Rhode Island,* 517 U.S. 484, 116 S.Ct. 1495, 134 L.Ed.2d 711 (1996); *Doran v. Salem Inn,* 422 U.S. 922, 932, 95 S.Ct. 2561, 45 L.Ed.2d 648 (1975) (declaring that "although the customary 'barroom' type of nude dancing may involve only the barest minimum of protected expression, we recognized [in *LaRue*] that this form of entertainment might be entitled to First and Fourteenth Amendment protection in some circumstances"); *Young v. American Mini Theatres,* 427 U.S.

50, 70, 96 S.Ct. 2440, 49 L.Ed.2d 310 (1976) (Stevens, J., plurality) (recognizing that "the First Amendment will not tolerate the total suppression of erotic materials that have some arguably artistic value, [yet] it is manifest that society's interest in protecting this type of expression is of a wholly different, and lesser, magnitude than that interest in untrammeled political debate"); *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 566, 111 S.Ct. 2456, 115 L.Ed.2d 504 (1991) (Rehnquist, C.J., plurality) (stating that "nude dancing of the kind sought to be performed here is expressive conduct within the outer perimeters of the First Amendment, though we view it as only marginally so"); *City of Erie v. Pap's A.M.*, 529 U.S. 277, 289, 120 S.Ct. 1382, 146 L.Ed.2d 265 (2000) (O'Connor, J., plurality) (holding that "[b]eing in a 'state of nudity' is not an inherently expressive condition. . . . [H]owever, nude dancing of the type at issue here is expressive conduct, although we think that it falls only within the outer ambit of the First Amendment's protection.").

1. *United States v. O'Brien*[12]

In 1966, David Paul O'Brien and several companions burned their Selective Service Registration cards on the steps of the South Boston Courthouse. Upon his arrest, O'Brien acknowledged that he knew he was violating

[12] 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968). Although this case does not involve a municipal ordinance regulating public nudity or providing for zoning of specific adult oriented businesses, it is nonetheless the most logical starting point for this discussion as the four-part test developed therein has been utilized in numerous cases involving ordinances regulating sexually oriented businesses.

federal law[13] by burning his card, but told the FBI agents that he did so because of his anti-war beliefs. O'Brien did not contest the fact that he destroyed the card and argued to the jury that he did it as a protest and in an attempt to influence others to adopt his anti-war beliefs. He was subsequently tried, convicted and sentenced.

On appeal, the Court of Appeals for the First Circuit held that the law was unconstitutional as they found the law was directed at public rather than private destruction of the certificates and thus "singl[ed] out persons engaged in protests for special treatment." *O'Brien,* 391 U.S. at 370, 88 S.Ct. at 1676. Consequently, the issue was presented to the United States Supreme Court to ultimately decide the constitutionality of the law.

In evaluating O'Brien's claims, the Supreme Court held that "when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms." *Id.* at 376, 88 S.Ct. at 1678-79. The Court then articulated what has now become the four-part test for evaluating, *inter alia,* regulations affecting sexually oriented businesses:

> [A] government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental

[13] 50 U.S.C.App. § 462(b), *amended by* Act of 1965, 79 Stat. 586. When Congress amended the statute in 1965, it added language so that at the time O'Brien burned his certificate, an offense was committed by any person "who forges, alters, knowingly destroys, knowingly mutilates, or in any manner changes any such certificate."

> interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than *is essential to the furtherance of that interest.*

Id. at 377, 88 S.Ct. at 1679.

2. *California v. LaRue*

The existence of First Amendment freedom of expression rights in the context of sexually oriented businesses was first recognized in *California v. LaRue,* 409 U.S. 109, 93 S.Ct. 390, 34 L.Ed.2d 342 (1972), *overruled on other grounds by 44 Liquormart, Inc. v. Rhode Island,* 517 U.S. 484, 116 S.Ct. 1495, 134 L.Ed.2d 711 (1996). At issue was the constitutionality of several regulations promulgated by the California Department of Alcoholic Beverage Control to prohibit live explicitly sexual entertainment and films in bars and other establishments licensed to dispense liquor by the drink. In upholding the regulations as a valid exercise of the state's power under the Twenty-first Amendment to the United States Constitution, the Court discussed the regulation of differing modes of expression in the context of adult entertainment:

> In *O'Brien* . . . the Court suggested that the extent to which "conduct" was protected by the First Amendment depended on the presence of a "communicative element," and stated: "We cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express in idea."

LaRue, 409 U.S. at 117, 93 S.Ct. at 396-97 (quoting *O'Brien,* 391 U.S. at 376, 88 S.Ct. at 1678). While the

Court agreed that "at least some of the performances to which these regulations address themselves [were] within the limits of the constitutional protection of freedom of expression," they also noted that California did not prohibit these performances across the board. *Id.* at 118, 93 S.Ct. at 397.

Although the determination of constitutionality turned on the Twenty-first Amendment, this case is important for what it says about incidental restrictions on public acts. Significantly, the Court opined that "as the mode of expression moves from the printed page to the commission of public acts that may themselves violate valid penal statutes, the scope of permissible state regulations significantly increases." *Id.* at 117, 93 S.Ct. at 396. Because the state was found to have broad latitude to control the manner in which alcohol was dispensed, any prohibition against performances of a sexual or adult nature in those establishments that were licensed to sell liquor by the drink was constitutional. As mentioned, it was the critical fact that the state did not prohibit such performances "across the board," and only prohibited them in such a way that any prohibition was merely incidental to its ability to regulate the dispensing of alcohol.[14]

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[14] In *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 516 116 S.Ct. 1495, 134 L.Ed.2d 711 (1996), which overruled *LaRue* insofar as it relied on the Twenty-first Amendment, the Court concluded that "*LaRue* would have [had] precisely the same result if it had placed no reliance on the Twenty-first Amendment . . . [as] the State has ample power to prohibit the sale of alcoholic beverages in inappropriate locations."

3. *Young v. American Mini Theatres, Inc.*

In *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 96 S.Ct. 2440, 49 L.Ed.2d 310 (1976), the Supreme Court upheld the constitutionality of a Detroit zoning ordinance, which prohibited the exhibition of "adult" films in theaters not licensed as "adult motion picture theaters." In the plurality opinion, written by Justice Stevens, the Court concluded that "[t]he mere fact that the commercial exploitation of material protected by the First Amendment is subject to zoning and other licensing requirements is not a sufficient reason for invalidating these ordinances." *Id.* at 62, 96 S.Ct. at 2448.

Significantly, the plurality opinion did not rest its decision to uphold the ordinance on the basis of the four-part test of *O'Brien, supra.* However, in a concurring opinion, Justice Powell found that the ordinance had an impact on the communication involved, i.e. the movies themselves, and thus analyzed the constitutionality of the ordinance utilizing the four-part test. Justice Powell thus found that the ordinance was justified because the city clearly had the power to enact the zoning ordinance and the ordinance would further the city's substantial and important interest in having stable residential and commercial neighborhoods free from the deteriorating effects associated with "adult" movie theaters. As for the third and fourth prongs of the test, Justice Powell concluded that because this ordinance was already in existence "for a full decade before adult establishments were brought under it[,]" there was no serious argument that governmental interest in including adult establishments in the ordinance "was wholly unrelated to any suppression of free expression." *Id.* at 80-81, 96 S.Ct. at 2457. "Nor [was] there reason to question that the degree of incidental

encroachment upon such expression was the minimum necessary to further the purpose of the ordinance." *Id.* at 81-82, 96 S.Ct. at 2458.

Although Justice Powell and Justice Stevens disagreed on the ultimate reasoning to uphold the constitutionality of the ordinance, both justices agreed that the ordinance was not an attempt to suppress expression. Similarly, Justices Powell and Stevens found that the ordinance was justified "by the city's interest in preserving the character of its neighborhoods." *Id.* at 71, 96 S.Ct. at 2452 (Stevens, J., plurality). Justice Powell, quoting portions of the plurality opinion, found that "the Council was motivated by its perception that the 'regulated uses,' when concentrated, worked a 'deleterious effect upon the adjacent areas' and could 'contribute to the blighting or downgrading of the surrounding neighborhood.'" *Id.* at 74-75, 96 S.Ct. at 2454 (Powell, J., concurring).

"The record disclosed a factual basis for the Common Council's conclusion that this kind of restriction will have the desired effect." *Id.* at 71, 96 S.Ct. at 2452-53. The factual basis referred to involved the council's determination "that a concentration of 'adult' movie theaters causes the area to deteriorate and become a focus of crime, effects which are not attributable to theaters showing other types of films. It is this secondary effect which these zoning ordinances attempt to avoid, not the dissemination of 'offensive speech.'" *Id.* at 71, n. 34, 96 S.Ct. at 2453 (Stevens, J. plurality). A plurality of the Court thus concluded that "the city's interest in attempting to preserve the quality of urban life is one that must be accorded high respect. Moreover, the city must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems." *Id.* at 71, 96 S.Ct. at 2453 (Stevens, J.,

plurality); *see also id.* at 82, n. 6, 96 S.Ct. at 2458 (Powell, J., concurring) ("We have here merely a decision by the city to treat certain movie theaters differently because they have markedly different effects upon their surroundings.").

Thus, for the first time the Court announced that zoning ordinances regulating sexually oriented businesses could be justified on the basis of preventing the negative secondary effects associated with those types of businesses. In his concurring opinion, Justice Powell also suggested that a party seeking to invalidate an ordinance for violating the First Amendment could do so by showing that the ordinance encompassed movie theaters which posed no deleterious effect. *Id.* at 82, 96 S.Ct. at 2458 (Powell, J., concurring) ("The case would present a different situation had Detroit brought within the ordinance types of theaters that had not been shown to contribute to the deterioration of surrounding areas.").

4. *Schad v. Mount Ephraim*

In *Schad v. Borough of Mount Ephraim,* 452 U.S. 61, 101 S.Ct. 2176, 68 L.Ed.2d 671 (1981), the Supreme Court applied a heightened level of scrutiny to a zoning ordinance enacted by the Borough of Mount Ephraim, which prohibited all live entertainment, including non-obscene, nude dancing. The Court found the ordinance unconstitutional in that it "prohibit[ed] a wide range of expression long been held to be within the protection of the First and Fourteenth Amendments." *Id.* at 65, 101 S.Ct. at 2181. Furthermore, no justification was provided "for the exclusion of a broad category of protected expression as one of

the permitted commercial uses in the Borough." *Id.* at 67, 101 S.Ct. at 2181-82.

Although at first blush *Young, supra,* would appear to be the controlling case for resolution of the issue in *Schad,* the Court found otherwise.

> [*Young*] emphasized that the challenged restriction on the location of adult movie theaters imposed a minimal burden on protected speech. The restriction did not affect the number of adult movie theaters that could operate in the city; it merely dispersed them. The Court did not imply that a municipality could ban all adult theaters – much less all live entertainment or all nude dancing – from its commercial districts citywide. Moreover, it was emphasized in that case that the evidence presented to the Detroit Common Council indicated that the concentration of adult movie theaters in limited areas led to deterioration of surrounding neighborhoods, and it was concluded that the city had justified the incidental burden on First Amendment interests resulting from merely dispersing, but not excluding, adult theaters.

Schad, 452 U.S. at 71-72, 101 S.Ct. at 2184 (citations omitted).

In contrast, however, the Court found that "Mount Ephraim [had] not adequately justified its substantial restriction of protected activity." *Id.* (citation omitted). Although Mount Ephraim offered several justifications, it is Interesting to note that *none* of those justifications concerned the possibility of negative secondary effects from *allowing all live entertainment.* Mount Ephraim did offer as justification that banning commercial live entertainment would "avoid the problems that may be

associated with live entertainment, such as parking, trash, police protection, and medical facilities." *Id.* at 73, 101 S.Ct. at 2185. However, the Court found the distinction inapposite.

> The Borough has presented no evidence, and it is not immediately apparent as a matter of experience, that live entertainment poses problems of this nature more significant than those associated with various permitted uses; nor does it appear that the Borough's zoning authority has arrived at a defensible conclusion that unusual problems are presented by live entertainment.

Id. (citation omitted).

Thus, it became clear that the Court was prepared to analyze ordinances regulating adult entertainment under a heightened level of scrutiny "when a zoning law [broadly] infringes on a protected liberty." *Id.* at 68, 101 S.Ct. at 2182. In *Schad,* the ordinance was overly broad in its restrictions, *i.e.* it was not narrowly drawn, and the justifications offered were inadequate to support a "substantial government interest."

5. *City of Renton v. Playtime Theatres, Inc.*

In *City of Renton v. Playtime Theatres, Inc.,* 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986), the Supreme Court again dealt with a zoning ordinance, although unlike the zoning ordinance at issue in *Young, supra,* the ordinance enacted by Renton sought to concentrate adult movie theaters rather than disperse them. The Court upheld the regulation as a valid governmental response to the "admittedly serious problems" associated with adult movie theaters. *Id.* at 52, 106 S.Ct. at 931.

Although the majority relied heavily upon the analysis and reasoning supplied by *Young*, the Court in *Renton* offered a slightly different framework within which to analyze zoning ordinances. First, the Court determined that the ordinance did not ban adult theaters altogether, but rather provided that those theaters may not be located within 1,000 feet of any residential zone, single- or multiple-family dwelling, church, park or school. As such, it was characterized as a time, place and manner regulation.

In the next step of the analysis, the Court had to determine whether the ordinance was "content-neutral," subjecting it to intermediate scrutiny, or "content-based," subjecting it to a heightened level of scrutiny. The *Renton* Court found the ordinance at issue did not necessarily "fit neatly" into either category, but nonetheless concluded that the Renton ordinance was aimed "not at the *content* of the films shown at 'adult motion picture theatres,' but rather at the *secondary effects* of such theaters on the surrounding community," *id.* at 47, 106 S.Ct. at 929 (emphasis in original), and as such it was consistent with the Court's definition of "content-neutral" speech regulations. Important to this step of the analysis was the Court's reliance on the District Court's finding that "the City Council's '*predominate* concerns' were with the secondary effects of adult theaters, and not with the content of adult films themselves." *Id.* (emphasis in original). The Court further noted that "[t]he ordinance by its terms is designed to prevent crime, protect the city's retail trade, maintain property values, and generally 'protec[t] and preserv[e] the quality of [the city's] neighborhoods, commercial districts, and the quality of urban life,' not to suppress the expression of unpopular views." *Id.* at 49, 106 S.Ct. at 929 (citation omitted).

In the third and final step of the analysis, the Court had to determine whether, as a "content-neutral" regulation, the ordinance was designed "to serve a substantial governmental interest and allow[ed] for reasonable alternative avenues of communication." *Renton,* 475 U.S. at 50, 106 S.Ct. at 930 (citing *Clark v. Community for Creative Non-Violence,* 468 U.S. 288, 293, 104 S.Ct. 3065, 3069, 82 L.Ed.2d 221 (1984); *Heffron v. International Society for Krishna Consciousness, Inc.,* 452 U.S. 640, 649, 654, 101 S.Ct. 2559, 2564, 2567, 69 L.Ed.2d 298 (1981)). In finding the ordinance met this standard, the Court opined that "a city's 'interest in attempting to preserve the quality of urban life is one that must be accorded high respect.'" *Id.* (quoting *Young,* 427 U.S. at 71, 96 S.Ct. at 2453 (plurality opinion)).

Renton is significant in terms of providing an analytical framework that is not altogether different from the analysis provided in *O'Brien,* at least with respect to *Renton*'s third prong and *O'Brien*'s second prong. However, perhaps more important is the Court's criticism of the "unnecessarily rigid burden of proof" the Court of Appeals for the Ninth Circuit placed on the city of Renton. *Id.* The Court of Appeals had ruled that the city's justifications for the ordinance were "conclusory and speculative," mainly because the ordinance was enacted "without the benefit of studies specifically relating to 'the particular problems or needs of Renton.'" *Id.* (quoting *Playtime Theaters, Inc. v. City of Renton,* 748 F.2d 527, 537 (9th Cir.1984)). The Supreme Court, however, found that Renton "relied heavily on the experience of, and studies produced by, the city of Seattle . . . [where] the adult theater zoning ordinance was aimed at preventing the secondary effects caused by the presence of even one such theater in a given

neighborhood." *Id.* (citing *Northend Cinema, Inc. v. Seattle,* 90 Wash.2d 709, 585 P.2d 1153 (Wash.1978)).

As a result, the Court held "that Renton was entitled to rely on the experiences of . . . other cities, and in particular on the 'detailed findings' summarized in the Washington Supreme Court's *Northend Cinema* opinion, in enacting its adult theater zoning ordinance." *Id.* at 51, 106 S.Ct. at 931. The Court further stated:

> The First Amendment does not require a city, before enacting such an ordinance, to conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses.

Renton, 475 U.S at 51-52, 106 S.Ct. at 931. In recognizing that Renton could properly rely on evidence generated by other cities, the Court found the method employed in Renton furthered its substantial interests. The Court further noted that Renton must be given the opportunity to experiment with solutions to prevent the serious problems associated with sexually oriented businesses. To that end, the Court found the ordinance narrowly drawn to affect only that category of theaters shown to produce the unwanted secondary effects. *Id.* at 52, 106 S.Ct. at 931.

Finally, the Court held that the zoning ordinance allowed for reasonable alternative avenues of communication in that it left "some 520 acres, or more than five percent of the entire land area in Renton, open to use as adult theater sites." *Id.* at 53, 106 S.Ct. at 932. Significantly, the Court found that Renton had not used "'the power to zone as a pretext for suppressing expression.'"

Id. at 54, 106 S.Ct. at 932 (quoting *Young,* 427 U.S. at 84, 96 S.Ct. at 2459 (Powell, J., concurring)).

6. *Barnes v. Glen Theatre, Inc.*

In *Barnes v. Glen Theatre, Inc.,* 501 U.S. 560, 111 S.Ct. 2456, 115 L.Ed.2d 504 (1991), the Supreme Court had to determine, for the first time, whether an indecency statute, not unlike that at issue in the case at bar, violated the First Amendment's guarantee of freedom of expression. Indiana's public indecency statute, in effect, required exotic dancers to wear pasties and G-strings. Although a majority of the Court agreed that the statute was constitutional, the Court was unable to agree on a single rationale supporting this conclusion.

In the plurality opinion, written by Chief Justice Rehnquist, in which Justices O'Connor and Kennedy joined, the Court noted that Indiana had not banned nude dancing across the board, but it did prohibit public nudity across the board. In addressing Barnes' contention that the restriction on nude dancing was a valid "time, place or manner" restriction under cases such as *Clark v. Community for Creative Non-Violence,* 468 U.S. 288, 104 S.Ct. 3065, 82 L.Ed.2d 221 (1984), the Court recognized that the "time, place or manner" test is significantly similar to the four-part test of *O'Brien, supra.* Moreover, the plurality reiterated that "'nude dancing is not without its First Amendment protections from official regulation.'" *Barnes,* 501 U.S. at 566, 111 S.Ct. at 2460 (quoting *Schad,* 452 U.S. at 66, 101 S.Ct. at 2181). Thus, the Court applied the rule set forth in *O'Brien, supra.*

In applying *O'Brien,* Chief Justice Rehnquist, writing for the plurality, found that Indiana's statute was justified

"despite its incidental limitations on some expressive activity." *Id.* at 567, 111 S.Ct. at 2461. The Court found the statute was within Indiana's constitutional power and furthered the state's substantial governmental interest in "protecting order and morality." *Id.* at 569, 111 S.Ct. at 2462. Furthermore, the Court found Indiana's interests were "unrelated to the suppression of free expression." *Id.* Finally, the Court found that the fourth part of the *O'Brien* test was satisfied as "Indiana's requirements that the dancers wear at least pasties and G-strings [was] modest, and the bare minimum necessary to achieve the State's purpose." *Id.* at 572, 111 S.Ct. at 2463.

Although instructive, the plurality opinion does not constitute the holding of *Barnes.* Here, Justice Souter's concurring opinion provided the narrowest grounds for the judgment of the Court, and thus, his concurrence constitutes the holding according to the rule of *Marks v. United States,* 430 U.S. 188, 193, 97 S.Ct. 990, 993, 51 L.Ed.2d 260 (1977) ("When a fragmented Court decides a case and no single rationale explaining the results enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.").

Justice Souter agreed with the plurality that the case was properly analyzed under *O'Brien.* However, Justice Souter disagreed with the plurality's determination that the second prong of *O'Brien* was satisfied by the state's substantial interest in protecting order and morality. In contrast, Justice Souter considered the limitations on nude dancing justified by the "State's substantial interest in combating the secondary effects of adult entertainment establishments." *Barnes,* 501 U.S. at 582, 111 S.Ct. at 2468-69. Justice Souter further opined that although the

motivation in enacting the statute was not entirely clear, as Indiana has no legislative history, the Court's "appropriate focus is not an empirical enquiry into the actual intent of the enacting legislature, but rather the existence or not of a current governmental interest in the service of which the challenged application of the statute may be constitutional." *Id.* at 582, 111 S.Ct. at 2469. Thus, in Justice Souter's view, "the interest asserted by [the State] in preventing prostitution, sexual assault, and other criminal activity . . . is sufficient under *O'Brien* to justify the State's enforcement of the statute against the type of adult entertainment at issue here." *Id.* at 583, 111 S.Ct. at 2469.

Thus, Justice Souter found *Renton, Young*, and *LaRue, supra,* controlling. Although *Renton* and *Young* involved zoning ordinances, the Court in each of those cases found the states' interest in preventing negative secondary effects associated with sexually oriented businesses to be a substantial interest, justifying the incidental limitations on the freedom of expression found to exist in those cases. Justice Souter found the type of entertainment provided by the Glen Theatre to be of the same character as that at issue in the aforementioned cases. He thus concluded:

> It therefore is no leap to say that live nude dancing of the sort at issue here is likely to produce the same pernicious secondary effects as the adult films displaying "specified anatomical areas" at issue in *Renton*. . . . In light of *Renton*'s recognition that legislation seeking to combat the secondary effects of adult entertainment need not await localized proof of those effects, the State of Indiana could reasonably conclude that forbidding nude entertainment . . . furthers its

> interest in preventing prostitution, sexual assault, and associated crimes.

Id. at 584, 111 S.Ct. at 2470.

As for the third prong of *O'Brien,* Justice Souter found that Indiana's interest in combating the secondary effects associated with sexually oriented businesses was "not at all inherently related to expression[,]" but rather the secondary effects "are correlated with the existence of establishments offering such dancing, without deciding what the precise causes of the correlation actually are." *Id.* at 585-86, 111 S.Ct. at 2470. Thus, "[b]ecause the State's interest in banning nude dancing results from a simple correlation of such dancing with other evils, rather than from a relationship between the other evils and the expressive component of the dancing, the interest is unrelated to the suppression of free expression." *Id.* at 586, 111 S.Ct. at 2471.

As to the fourth prong of *O'Brien,* that the restriction is no greater than is essential to further the governmental interest, Justice Souter succinctly stated that limitation requiring pasties and a G-string "is minor when measured against the dancer's remaining capacity and opportunity to express the erotic message." *Id.* at 587, 111 S.Ct. at 2471. Although pasties and a G-string "moderate the expression to some degree . . . dropping the final stitch is prohibited." *Id.* However, the dancer and her employer were otherwise not limited, short of obscenity laws, in the ways in which the erotic message could be conveyed.

By contrast, Justice Scalia, concurring only in the judgment, found that the statute should be upheld not because it could survive First Amendment scrutiny under any level of evaluation, but because the statute was a

"general law regulating conduct and not specifically directed at expression, [and thus] it [was] not subject to First Amendment scrutiny at all." *Id.* at 572, 111 S.Ct. at 2463. Justice Scalia suggested that the performances at issue in this case were not expressive activities because it is not "conduct that is normally engaged in for the purpose of communicating an idea." *Id.* at 578, 111 S.Ct. at 2466, n. 4. Additionally, Justice Scalia disagreed with the plurality's conclusion insofar as it supported an analysis that "requires judicial assessment of the 'importance' of government interests – and especially of government interests in various aspects of morality." *Id.* at 580, 111 S.Ct. at 2467. Thus, Justice Scalia would have held Indiana's indecency statute constitutional, finding Indiana's moral opposition to the prohibition against nude dancing sufficient under a rational basis review. *Id.* at 580, 111 S.Ct. at 2468.

Although decided by a plurality of the Court, *Barnes* is important for what it says about the second prong of the *O'Brien* test. Justice Souter's distinction with regard to the justification necessary to satisfy *O'Brien,* as well as the Court's appropriate function in evaluating the justification offered for the regulation, suggests that evidence proffered by a party contesting the constitutionality of a regulation should be geared toward disproving the governmental interest at the time the regulation is enacted as opposed to uncovering an illegitimate governmental motive. This notion can be more adequately developed, however, following a discussion of the burden-shifting involved in contesting such a regulation, an issue covered in the cases that follow.

7. *City of Erie v. Pap's A.M.*

In *City of Erie v. Pap's A.M.*, 529 U.S. 277, 120 S.Ct. 1382, 146 L.Ed.2d 265 (2000), the Supreme Court upheld an ordinance enacted by the City of Erie (Pennsylvania), which made it an offense to knowingly or intentionally appear in public in a state of nudity. Similar to the indecency statute at issue in *Barnes, supra,* as well as in the case at bar, Erie's statute required that exotic dancers wear, at a minimum, pasties and a G-string.

The plurality opinion, written by Justice O'Connor, in which Chief Justice Rehnquist, Justice Kennedy, and Justice Breyer joined, "clarify[ied] that government restrictions on public nudity such as the ordinance at issue here should be evaluated under the framework set forth in *O'Brien* for content-neutral restrictions on symbolic speech." *Id.* at 289, 120 S.Ct. at 1391. With that, the plurality found that the Erie ordinance generally prohibited all public nudity, "regardless of whether that nudity [was] accompanied by expressive activity." *Id.* at 290, 120 S.Ct. at 1391. The plurality also noted that Erie's ordinance contained a preamble, which stated that the ordinance was adopted "'for the purpose of limiting a recent increase in nude live entertainment within the City, which activity adversely impacts and threatens to impact on public health, safety and welfare by providing an atmosphere conducive to violence, sexual harassment, public intoxication, prostitution, the spread of sexually transmitted diseases and other deleterious effects.'" *Id.* at 290, 120 S.Ct. at 1391-92 (citation omitted). The plurality, in recognizing the findings by the Pennsylvania Supreme Court, noted that one purpose of the ordinance was to combat negative secondary effects.

As in the Court's previous opinions, the plurality here found that *Erie*'s ordinance

> does not attempt to regulate the primary effects of the expression, *i.e.*, the effect on the audience of watching nude erotic dancing, but rather the secondary effects, such as the impacts on public health, safety, and welfare, which we have previously recognized are "caused by the presence of even one such" establishment.

Id. at 291, 120 S.Ct. at 1392 (citing *Renton,* 475 U.S. at 47-48, 50, 106 S.Ct. at 930) (additional citation omitted). The operator of the establishment in Erie argued that the ordinance was "aimed at" suppressing expression, and noted the comments of an attorney for the city, who stated that the public nudity ban was not intended to apply to "legitimate" theater productions. Thus, Pap's A.M. alleged the city council had an illicit motive in enacting the regulation. However, as the Court had held in *O'Brien* and *Renton, supra,* it would not strike down "an otherwise constitutional statute on the basis of an alleged illicit motive." *Pap's A.M.,* 529 U.S. at 292, 120 S.Ct. at 1392-93.

Much of the reasoning offered in *Pap's A.M.* was similar to that found in *Barnes.* However, the plurality had to contend with Justice Stevens' dissent, in which he argued that the ordinance enacted a complete ban on expression. While recognizing that the public nudity ban had the effect of restricting one particular mode of expression, Justice O'Connor opined that "simply to define what is being banned as the 'message' is to assume the conclusion." *Id.* at 293, 120 S.Ct. at 1393. Thereafter, Justice O'Connor compared the regulation in *O'Brien* against destroying one's draft card, justified by "the Government's interest in preventing the harmful 'secondary effects' of

that conduct (disruption to the Selective Service System)," to the Erie ordinance, and concluded that "[a]lthough there may be cases in which banning the means of expression so interferes with the message that it essentially bans the message, that is not the case here." *Id.*

In support of this position, the plurality noted that "[t]he State's interest in preventing harmful secondary effects is not related to the suppression of expression. . . . [Rather,] the ordinance seeks to deter crime and the other deleterious effects caused by the presence of such an establishment in the neighborhood." *Id.* (citing *Renton*, 475 U.S. at 50-51, 106 S.Ct. 925, 89 L.Ed.2d 29). Similarly, the plurality found that, although the ban minimally affected the expression "that occurs when the last stitch is dropped," the dancers were still free to perform wearing pasties and G-strings, and thus "[a]ny effect on the overall expression is *de minimis*." *Id.* at 294, 120 S.Ct. at 1393. "If States are to be able to regulate secondary effects, then *de minimis* intrusions on expression such as those at issue here cannot be sufficient to render the ordinance content based."

In upholding the validity of the Erie ordinance under the four-part *O'Brien* test, the plurality found that the secondary effects associated with nude dancing are "undeniably important." *Id.* at 296, 120 S.Ct. at 1395. More importantly, however, the plurality reiterated that

> in terms of demonstrating that such secondary effects pose a threat, the city need not "conduct new studies or produce evidence independent of that already generated by other cities" to demonstrate the problem of secondary effects, "so long as whatever evidence the city relies upon is

> reasonably believed to be relevant to the problem that the city addresses."

Id. (quoting *Renton,* 475 U.S. at 51-52, 106 S.Ct. 925, 89 L.Ed.2d 29). Thus, because the nude dancing at issue in Erie was of the "same character" as the entertainment at issue in *Renton, Young*, and *LaRue, supra,* "it was reasonable for Erie to conclude that such nude dancing was likely to produce the same secondary effects." *Id.* at 297, 120 S.Ct. at 1395.

Here, again, the plurality addresses the evidentiary basis necessary to support a government's substantial interest in preventing the asserted secondary effects while minimally intruding on protected expression. In so doing, the plurality cites *O'Brien, supra,* for the fact that there, the Court did not require evidence

> that the integrity of the Selective Service System would be jeopardized by the knowing destruction . . . of draft cards. It simply reviewed the Government's various administrative interests in issuing the cards, and then concluded that "Congress has a legitimate and substantial interest in preventing their wanton and unrestrained destruction. . . ."

Id. at 298-99, 120 S.Ct. at 1396 (quoting *O'Brien,* 391 U.S. at 378-380, 88 S.Ct. 1673, 20 L.Ed.2d 672). The Court noted that there were no studies documenting the actual effects of card mutilation on the Government's asserted interests and that the Court permitted Congress to take "official notice . . . that draft card destruction would jeopardize the system." *Id.* at 299, 120 S.Ct. at 1396. Thus the Court recognized some leeway is appropriate so long as the regulation is unrelated to the suppression of expression.

Moreover, the Court acknowledged that *O'Brien* required no evidentiary showing that the threatened harm was real.[15] Although Justice Souter, in his dissent, suggests that empirical analysis is required rather than allowing a city to justify a regulation on the basis of experiences and findings in other cities, the plurality rejects such a contention on the basis of the Court's prior holding in *Nixon v. Shrink Missouri Government PAC,* 528 U.S. 377, 394, 120 S.Ct. 897, 145 L.Ed.2d 886 (2000) (noting that the "invocation of academic studies said to indicate" that certain harms are not real is insufficient to cast doubt on the experience of the local government). Thus, the Court found the city must be allowed a "'reasonable opportunity to experiment with solutions to admittedly serious problems,'" *Id.* at 301, 120 S.Ct. at 1397 (quoting *Renton,* 475 U.S. at 52, 106 S.Ct. 925, 89 L.Ed.2d 29), "but the city must balance its efforts to address the problem with the requirement that the restriction be no greater than necessary to further city's interest." *Id.*

Finally, the plurality opinion recognized that the city council members were the individuals with first-hand knowledge of the particular problems associated with nude dancing establishments. Thus, the city council members

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[15] Appellee Jameson cites to *Edenfield v. Fane,* 507 U.S. 761, 770-71, 113 S.Ct. 1792, 1800, 123 L.Ed.2d 543 (1993), wherein the United States Supreme Court states that the government must "demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." We find, however, that *Edenfield* is distinguishable in that it addressed commercial speech under the standard announced in *Central Hudson Gas & Electric Corp. v. Public Service Comm'n of N.Y.,* 447 U.S. 557, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980), and is thus not applicable to the facts of this case.

could make "particularized, expert judgments about the resulting harmful secondary effects." *Id.* at 298, 120 S.Ct. at 1395. Moreover, the Court noted that Pap's A.M. had not succeeded in casting "any specific doubt on the validity of [the city's] findings. . . . In the absence of any reason to doubt it, the city's expert judgment should be credited." *Id.* at 298, 120 S.Ct. at 1396. Although instructive, the Court's emphasis on the burden-shifting inherent in the analysis was more fully developed in its most recent opinion to date regarding an ordinance enacted by the City of Los Angeles.

8. *City of Los Angeles v. Alameda Books, Inc.*

In *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 122 S.Ct. 1728, 152 L.Ed.2d 670 (2002) (O'Connor, J., plurality), the Court, in another plurality opinion, upheld a zoning ordinance passed by the City of Los Angeles, which prohibited the operation of multiple adult businesses in a single building. The narrow question before the Court concerned the appropriate "standard for determining whether an ordinance serves a substantial government interest under *Renton, supra.*" *Alameda Books,* 535 U.S. at 433, 122 S.Ct. at 1733.

The city of Los Angeles provided, as support for the ordinance, a 1977 study, which reported city crime patterns provided by the Los Angeles Police Department. "That report indicated that, during the period from 1965 to 1975, certain crime rates grew much faster in Hollywood, which had the largest concentration of adult establishments in the city, than in the city of Los Angeles as a whole." *Id.* at 435, 122 S.Ct. at 1734. The Ninth Circuit Court of Appeals found that the 1977 study did not support "the inference that a concentration of adult operations

within a single adult establishment produced greater levels of criminal activity because the study focused on the effect that a concentration of establishments – not a concentration of operations within a single establishment – had on crime rates." *Id.* at 436, 122 S.Ct. at 1734-35.

The Supreme Court found the distinction inapposite. "The Court of Appeals' analysis . . . implicitly requires the city to prove that its theory is the only one that can plausibly explain the data because only in this manner can the city refute the Court of Appeals' logic." *Id.* at 437-38, 122 S.Ct. at 1735. "The assumption behind [the city's] theory is that having a number of adult operations in one single adult establishment draws the same dense foot traffic as having a number of distinct adult establishments in close proximity. . . ." *Id.* at 436, 122 S.Ct. at 1735. Thus the city's inference that reducing the concentration of adult operations in a neighborhood would reduce crime rates was rational.

This is not to say, however, that the city had to disqualify other possible theories to support its rationale.

> While the city certainly bears the burden of providing evidence that supports a link between concentrations of adult operations and asserted secondary effects, it does not bear the burden of providing evidence that rules out every theory for the link between concentrations of adult establishments that is inconsistent with its own.

Alameda Books, 535 U.S. at 437, 122 S.Ct. at 1735.

More importantly, the Court recognized that a municipality cannot offer "shoddy data" as justification for an ordinance.

> The municipality's evidence must fairly support its rationale for its ordinance. If plaintiffs fail to cast direct doubt on this rationale, either by demonstrating that the municipality's evidence does not support its rationale or by furnishing evidence that disputes the municipality's factual findings, the municipality meets the *Renton* standard. If plaintiffs succeed in casting doubt on a municipality's rationale in either manner, the burden shifts back to the municipality to supplement the record with evidence renewing support for a theory that justifies its ordinance.

Id. at 439, 122 S.Ct. at 1736 (citations omitted).

Justice Souter, whose concurring opinion in *Barnes, supra,* provided the narrowest grounds to support the Court's decision and thus constituted the holding therein, dissented in *Alameda Books.* In his dissent, he suggests that the city "demonstrate, not merely by appeal to common sense, but also with empirical data, that its ordinance will successfully lower crime." *Id.* at 439, 122 S.Ct. at 1736 (O'Connor, J., plurality). The plurality opinion, however, found that "such a requirement would go too far in undermining our settled position that municipalities must be given a reasonable opportunity to experiment with solutions to address the secondary effects" associated with sexually oriented businesses. *Id.* (internal quotations omitted) (citations omitted).

Moreover, the Court noted that "[a] municipality considering an innovative solution may not have data that could demonstrate the efficacy of its proposal because the solution would, by definition, not have been implemented previously." *Id.* at 439-40, 122 S.Ct. at 1736. Furthermore, the Court acknowledged that Los Angeles City Council

members were in a better position to gather and evaluate data on local problems than the judiciary. And, in any event, "*Renton* requires that municipal ordinances receive only intermediate scrutiny if they are content neutral." *Id.* at 440, 122 S.Ct. at 1737.

C. Court of Appeals erred as a matter of law.

1. Content neutral character of Ordinance No.2000-4.

A number of federal court decisions have followed in the wake of *Alameda Books, supra,* including the Eleventh Circuit Court of Appeals' decision in *Peek-A-Boo Lounge of Bradenton, Inc. v. Manatee County, Florida,* 337 F.3d 1251 (11th Cir.2003), *cert. denied,* 541 U.S. 988, 124 S.Ct. 2016, 158 L.Ed.2d 491 (2004), which our own Court of Appeals relied upon in finding that Jameson has successfully cast "direct doubt" on the rationale and findings offered by the McCracken County Fiscal Court in support of Ordinance No.2000-4.

In *Peek-A-Boo Lounge,* the Eleventh Circuit held, *inter alia,* that public nudity ordinances insofar as they are content neutral should be evaluated under the four-part *O'Brien* test and that zoning ordinances "regulating the conditions under which adult entertainment businesses may operate should be evaluated under the standards for time, place, and manner regulations set forth in *Renton* and reaffirmed in *Alameda Books.*" *Peek-A-Boo Lounge,* 337 F.3d at 1264. Our Court of Appeals has similarly recognized this distinction, but like the Supreme Court in *Barnes, supra,* the Court of Appeals has recognized that the *Renton* test "has been interpreted to embody much the same standards as those set forth in [O'Brien]." *Barnes,* 501 U.S. at 566, 111 S.Ct. at 2460; *see also Clark v.*

Community for Creative Non-Violence, 468 U.S. 288, 104 S.Ct. 3065, 82 L.Ed.2d 221 (1984).

Thus, the Court of Appeals properly began its deliberation by determining whether Section VII(b) of the McCracken County ordinance was content neutral or content based. In concluding that the ordinance was content based, the Court of Appeals found that, unlike the ordinances at issue in *Barnes* and *Pap's A.M., supra,* Section VII(b) "only prohibits nudity in a sexually-oriented business if an individual is 'engaged in any live performance.'" Slip Op. at 16. Despite finding the ordinance was content based, the Court of Appeals held that the ordinance was aimed at controlling the negative secondary effects associated with sexually oriented businesses, that the requirement that dancers wear pasties and G-strings was *de minimis,* and thus could nonetheless be analyzed under the four-part test set forth in *O'Brien.* To date, there is no Supreme Court case which has held that a "content based" regulation may be analyzed under an intermediate level of scrutiny.[16] However, we find that the ordinance is content neutral for the reasons set forth below, and thus we will analyze it accordingly.

In *Pap's A.M., supra,* a plurality of the Court found that the Erie ordinance, which, similar to Section VII(b) of the ordinance at issue here, had the effect of requiring exotic dancers to wear the *de minimis* covering of pasties

[16] Jameson has attempted to argue that a heightened level of scrutiny, reserved only for content based regulations, is the appropriate test in this case for analyzing the McCracken County ordinance. Yet, Jameson failed to file a cross-appeal on this issue, and we did not grant review on that basis. Thus the question of whether a heightened level of scrutiny must be applied is not before this Court.

and G-strings, was content neutral. Justice O'Connor explained that, "[t]o determine what level of scrutiny applies to the ordinance at issue *here, we must decide* 'whether the State's regulation *is related to the suppression of expression.*'" *Pap's A.M.,* 529 U.S. at 289, 120 S.Ct. at 1391 (quoting *Texas v. Johnson,* 491 U.S. 397, 403, 109 S.Ct. 2533, 105 L.Ed.2d 342 (1989)). "If the governmental purpose in enacting the regulation is unrelated to the suppression of expression, then the regulation need only satisfy the 'less stringent' standard from *O'Brien* for evaluating restrictions on symbolic speech." *Id.* (citing *Johnson,* 491 U.S. at 403, 109 S.Ct. 2533, 105 L.Ed.2d 342; *O'Brien,* 391 U.S. at 377, 88 S.Ct. 1673, 20 L.Ed.2d 672). However, "[i]f the government interest is related to the content of expression . . . then the regulation . . . must be justified under a more demanding standard." *Id.* (citing *Johnson,* 491 U.S. at 403, 109 S.Ct. 2533, 105 L.Ed.2d 342).

Justice O'Connor, relying on the *Barnes* decision, held that the government interest inherent in the Erie ordinance was that of "combating crime and other negative secondary effects caused by the presence of adult entertainment establishments . . . and not at suppressing the erotic message conveyed by this type of nude dancing." *Id.* at 291, 120 S.Ct. at 1392. In other words, the ordinance attempted to regulate the secondary effects commonly associated with "the presence of even one such" establishment, rather than "the effect on the audience of watching nude erotic dancing[.]" *Id.* (citing *Renton,* 475 U.S. at 47-48, 106 S.Ct. 925, 89 L.Ed.2d 29). And, to clarify the point, Justice O'Connor held that "government restrictions on public nudity . . . should be evaluated under the framework

set forth in *O'Brien* for content-neutral restrictions on symbolic speech." *Id.* at 289, 120 S.Ct. at 1391.

In applying this rationale to Section VII(b) of McCracken Ordinance No.2000-4, we find that the ordinance has the primary effect of combating crime, prostitution, the spread of sexually transmitted diseases and declining property values, otherwise known as the negative secondary effects generally associated with sexually oriented businesses. "If States are to be able to regulate secondary effects, then *de minimis* intrusions on expression such as those at issue here cannot be sufficient to render the ordinance content based." *Pap's A.M.*, 529 U.S. at 294, 120 S.Ct. at 1394; *see also Clark,* 468 U.S. at 299, 104 S.Ct. 3065, 82 L.Ed.2d 221; *Ward v. Rock Against Racism,* 491 U.S. 781, 791, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989) (holding that even if the regulation incidentally effects some speakers or messages but not others, the regulation is content neutral if it can be justified without reference to the content of the expression). Thus, we hold that the ordinance at issue here is content neutral.

Although the Court of Appeals erroneously found the ordinance here to be content based, it nonetheless found the correct standard to be applied was that set forth in *O'Brien.* However, the Court of Appeals stopped short of applying *O'Brien,* and instead remanded the case to the district court based on its interpretation of the Supreme Court's opinion in *Alameda Books, supra,* wherein the Court clarified how a court is to interpret the third step of the *Renton* analysis and the second prong of the *O'Brien* test. *See Peek-A-Boo Lounge,* 337 F.3d at 1264-65. We believe the court erred in this respect as Jameson must present evidence sufficient to cast "direct doubt" on the municipality's evidence and rationale, not just present any

evidence. Thus this Court will review the ordinance *de novo* in light of the plurality opinions in *Barnes* and *Pap's A.M., supra,* wherein the *O'Brien* test was applied, as well as the burden-shifting analysis of *Alameda Books, supra.*

In applying the first prong of *O'Brien,* we find that the McCracken County Ordinance No.2000-4 is clearly within the constitutional power of the county to enact.[17] Similarly, the third prong of *O'Brien* is satisfied as the government's interest in preventing negative secondary effects associated with sexually oriented businesses, such as Regina's II, is unrelated to the suppression of expression. *See Pap's A.M.,* 529 U.S. at 293, 120 S.Ct. at 1393. Finally, *O'Brien's* fourth prong is likewise satisfied as the requirement of "pasties and G-strings is a minimal restriction in furtherance of the asserted government interests, and the restriction leaves ample capacity to convey the dancer's erotic message." *Id.* at 301, 120 S.Ct. at 1397. There is, however, dispute as to whether the ordinance furthers a substantial government interest, *O'Brien's* second prong, as well as that quantum of evidence necessary to satisfy *Alameda Books'* burden shifting analysis.

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[17] KRS 67.803(3)(z) provides: "The fiscal court shall have the power to carry out governmental functions necessary for the operation of the county. Except as otherwise provided by statute or the Kentucky Constitution, the fiscal court of any county may enact ordinances, issue regulations, levy taxes, issue bonds, appropriate funds, and employ personnel in performance of the following public functions: Regulation of establishments or commercial enterprises offering adult entertainment and adult entertainment activities."

2. Furthering a Substantial Government Interest & Shifting the Burden.

Thus, the primary issue in this appeal is the Court of Appeals' determination that the second prong of *O'Brien* – whether the ordinance furthers the government's substantial interest – was unsatisfied, based on Jameson's alleged ability to cast "direct doubt" on the rationale and findings offered by the McCracken County Fiscal Court in support of Ordinance No.2000-4. The Court of Appeals thus concluded that the burden then shifted to the McCracken County Fiscal Court to proffer supplemental evidence in support of its contention that requiring the dancers at Regina's II to wear pasties and G-strings would further the government's interest in preventing the negative secondary effects discussed throughout this opinion. We find the Court of Appeals erred in its ruling for several reasons.

"The asserted interests of regulating conduct through a public nudity ban and of combating the harmful secondary effects associated with nude dancing are undeniably important." *Pap's A.M.*, 529 U.S. at 296, 120 S.Ct. at 1395. Furthermore, this justification is unrelated to the suppression of expression, despite any incidental burdens the restriction may place on the erotic message conveyed by nude dancing. "[R]equiring dancers to wear pasties and G-strings may not greatly reduce these secondary effects, but *O'Brien* requires only that the regulation further the interest in combating such effects." *Id.* at 301, 120 S.Ct. at 1397. Moreover, "*O'Brien* . . . required no evidentiary showing at all that the threatened harm was real." *Id.* at 299, 120 S.Ct. at 1396. We note, though, that the legislative concern of such harm must be real, not just a pretext for suppression of protected expression.

Moreover, a city may rely upon any evidence "reasonably believed to be relevant" for demonstrating that completely nude dancing contributes to the deterioration of residential and commercial neighborhoods. *Alameda Books,* 535 U.S. at 438, 122 S.Ct. at 1736; *Renton,* 475 U.S. at 51-52, 106 S.Ct. at 931. This includes, but is not limited to, the experiences of, and studies produced by, other cities, as well as "detailed findings" in judicial opinions. *Pap's A.M.,* 529 U.S. at 297, 120 S.Ct. at 1395; *Renton,* 475 U.S. at 50-51, 106 S.Ct. at 930-31. However, "[t]he municipality's evidence must *fairly* support the municipality's rationale for its ordinance." *Alameda Books,* 535 U.S. at 438, 122 S.Ct. at 1736 (emphasis added).

Admittedly, the initial burden on the city is not a rigid one. "Even in cases addressing regulations that strike closer to the core of First Amendment values, [the Court has] accepted a state or local government's *reasonable belief* that the experience of other jurisdictions is relevant to the problem it is addressing." *Pap's A.M.,* 529 U.S. at 297, 120 S.Ct. at 1395 (emphasis added). Furthermore, a city must be given "a reasonable opportunity to experiment with solutions" to the problems posed by the presence of "adult" establishments, such as Regina's II. *Young,* 427 U.S. at 71, 96 S.Ct. at 2453. A city is not required, "before enacting such an ordinance, to conduct new studies or produce evidence independent of that already generated by other cities[.]" *Renton,* 475 U.S. at 51, 106 S.Ct. at 931. Finally, municipalities may "rely, in part, on 'appeal to common sense,'" in enacting an ordinance. *Heideman v. South Salt Lake City,* 348 F.3d 1182, 1186 (10th Cir.2003) (quoting *Alameda Books,* 535 U.S. at 439, 122 S.Ct. at 1736).

The Court of Appeals recognized these principles when it stated that "cities are entitled to rely on studies from other municipalities and even prior court precedents which tend to establish the link between sexually oriented businesses and those negative secondary effects." Slip Op. at 21. Yet, it failed to articulate how Jameson's evidence successfully cast "direct doubt" on McCracken County's evidentiary findings, which were based in part on the findings of the various courts in *Renton, Young*, and *Barnes, supra,* as well as the County's findings that illicit sexual behavior occurs in sexually oriented businesses. Absent its rationale as to how Jameson had presented "actual and convincing evidence" sufficient to cast "direct doubt" on the rationale and evidence proffered by McCracken County, we are left to our own review of the record.

Although an exact definition of what may constitute "actual and convincing evidence" sufficient to cast "direct doubt" on a municipality's pre-enactment rationale has not yet been provided, we can surmise what it necessarily does not encompass. In *Alameda Books, supra,* the United States Supreme Court rejected the Ninth Circuit Court of Appeals' conclusion that "the city [of Los Angeles had] to prove that its theory about a concentration of adult operations attracting crowds of customers . . . is a necessary consequence of the 1977 study" relied upon by the city in enacting an ordinance prohibiting the operation of multiple adult businesses in a single building. *Alameda Books,* 535 U.S. at 437, 122 S.Ct. at 1735. Although the Supreme Court recognized that a city bears the burden of showing a nexus between concentrations of adult businesses and secondary effects, the Court was unwilling to place upon the city the onerous burden of requiring it to "rule[] out

every theory for the link between concentrations of adult establishments that is inconsistent with its own." *Id.* Further, the Court reiterated that it, in *Renton,* it had refused to set such a high bar and that a city could rely on *any* evidence, short of "shoddy data," that the city "reasonably believed to be relevant" for establishing a link between the regulation and a substantial government interest. *Id.* at 438, 122 S.Ct. at 1736 (citing *Renton,* 475 U.S. at 51-52, 106 S.Ct. 925, 89 L.Ed.2d 29; *Barnes,* 501 U.S. at 584, 111 S.Ct. 2456).

Furthermore, the Supreme Court has explicitly rejected the requirement that a municipality show, by empirical data, that its ordinance will successfully "cure" the secondary effects attributed to the establishments at issue in this case. "Such a requirement would go too far in undermining our settled position that municipalities must be given a 'reasonable opportunity to experiment with solutions' to address the secondary effects of protected speech." *Alameda Books,* 535 U.S. at 439, 122 S.Ct. at 1736 (quoting *Young,* 427 U.S. at 71, 96 S.Ct. 2440, 49 L.Ed.2d 310); *see also Pap's A.M.,* 529 U.S. at 300, 120 S.Ct. at 1397 (addressing Justice Souter's dissent, wherein he would require empirical analysis, and recognizing that this idea has been "flatly rejected"); *Nixon,* 528 U.S. at 394, 120 S.Ct. 897, 145 L.Ed.2d 886 (noting that the "invocation of academic studies said to indicate" that certain threatened harms were not real was insufficient to cast doubt on the experience of the local government).

As for the burden-shifting analysis set forth in *Alameda Books,* we note that the procedure therein does not advance the notion that challengers, such as Jameson, can merely devise their own theories of secondary effects. Instead, the challenger must present "actual and convincing evidence"

that specifically rebuts the municipality's rationale for the ordinance. To require otherwise would essentially require "the [county to] provide evidence that not only supports the claim that its ordinance serves an important government interest, but also does *not* provide support for any other approach to serve that interest." *Alameda Books,* 535 U.S. at 438, 122 S.Ct. at 1736 (emphasis added). Moreover, the task of casting "direct doubt" on the legislative judgment has been described as a "heavy burden," involving the rebuttal of more than just some of the categories of secondary effects relied upon by the municipality. *See, e.g., Fantasyland Video v. County of San Diego,* 373 F.Supp.2d 1094, 1110 (S.D.Cal.2005).

Justice Kennedy, in his concurring opinion in *Alameda Books,* recognized that local governments are in a much better position to evaluate the conditions that exist in their cities and that courts should not second-guess their assessments of such. *Alameda Books,* 535 U.S. at 451-52, 122 S.Ct. at 1743 (Kennedy, J., concurring). If the regulation furthers the government's interest in preventing at least one of the identified secondary effects, it meets the substantial government interest requirement. *See, e.g., World Wide Video of Washington, Inc. v. City of Spokane,* 368 F.3d 1186, 1196 (9th Cir.2004) (finding that the elimination of pornographic litter, by itself, represented a substantial government interest); *SOB, Inc. v. County of Benton,* 317 F.3d 856, 863 (8th Cir.2003) (noting that the adult business's evidence addressed only two adverse secondary effects, property value and crime in the vicinity of the establishment, both of which were relevant to zoning, but did not diminish the county's interest in combating other adverse secondary effects such as prostitution and drug use). To that we add that it is irrelevant whether the

local government is actually wrong regarding the extent of all the secondary effects that have actually occurred or may occur in the future when considering its decision to regulate the sexually oriented business. Rather, the emphasis is on whether the decision to regulate is merely a pre-text to suppress the freedom of expression. And, of course, evidence of the occurrence, or non-occurrence, of the feared secondary effects will bear on the reasonableness of the legislative belief for the need of such regulation. But, such evidence must rise to the level of casting "direct doubt" on the county's evidence supporting that reasonable belief, including whether the county's interest is, indeed, substantial.

3. Municipality is not required to prove "local" secondary effects.

In reversing and remanding the case to the district court, the Court of Appeals held that Jameson had successfully shifted the burden back to the McCracken County Fiscal Court by demonstrating a lack of secondary effects *in McCracken County.* In doing so, the Court required on remand that the fiscal court must "proffer supplementary evidence indicating that Section VII(b)'s ban on totally nude dancing furthers a substantial government interest *in McCracken County.*" Slip Op. at 24 (emphasis in original). Not only does *Alameda Books* not support such a conclusion, but the requirement of a finding of local secondary effects essentially changes substantive law regarding the secondary effects evidence necessary to further a substantial government interest. Thus the Court of Appeals erred in so ruling.

Initially, we note that *Alameda Books* retained the Court's holding in *Renton, supra,* wherein a substantial

government interest could be furthered by "any evidence reasonably believed to be relevant." *Alameda Books,* 535 U.S. at 438, 122 S.Ct. at 1736. However, the Court of Appeals erred by relying on *Peek-A-Boo Lounge, supra,* in support of a local secondary effects finding requirement.

Peek-A-Boo Lounge is distinguishable not only because the regulation at issue there was more restrictive, but also because the adult business, which challenged the regulation, hired actual expert witnesses and submitted volumes of evidence directly attacking the studies relied upon by the county. *See Peek-A-Boo Lounge,* 337 F.3d 1251 (11th Cir.2003). Furthermore, the ruling in *Peek-A-Boo Lounge* is against the weight of cases decided under the *Renton* standard both pre- and post-*Alameda Books, supra. See, e.g., BZAPS, Inc. v. City of Mankato,* 268 F.3d 603, 606 (8th Cir.2001); *SOB, Inc. v. County of Benton,* 317 F.3d 856, 863 (8th Cir.2003). We thus decline to adopt the rationale offered by the eleventh circuit in *Peek-A-Boo Lounge* wherein the court concluded that "the constitutionality of an ordinance will depend on local conditions." *Peek-A-Boo Lounge,* 337 F.3d at 1272 (quoting *Flanigan's Enterprises, Inc. v. Fulton County, Ga.,* 242 F.3d 976, 987 (11th Cir.2001)).

In *Renton,* the Supreme Court addressed the Ninth Circuit's holding that the city of Renton had improperly relied on the findings of other cities "in lieu of evidence about the effects of adult theaters on Renton," and thus the city's justifications for the ordinance were conclusory and speculative. *Renton,* 475 U.S. at 46, 106 S.Ct. at 928 (internal citations omitted). In rejecting that holding, the Supreme Court concluded that this would impose an "unnecessarily rigid burden of proof" and that Renton was entitled to rely on evidence from other jurisdictions as well

as prior judicial decisions. *Id.* at 51-52, 106 S.Ct. at 930-31. Our Court of Appeals has similarly held that

> [u]nder *[City of] Erie [v. Pap's A.M.],* the government is not required to demonstrate actual adverse effects in its particular locality. It is enough to show that it is aware of the problems in other locales and the ordinance was passed to prevent or reduce those effects. It need not await localized proof of those effects.

Restaurant Ventures, LLC v. Lexington-Fayette Urban County Government, 60 S.W.3d 572, 578-79 (Ky.App.2001) (citation omitted). Furthermore, "[a]ll five Justices in the *Alameda Books* majority affirmed *Renton*'s core principle that local governments are not required to conduct their own studies in order to justify an ordinance designed to combat the secondary effects of adult businesses." *World Wide Video,* 368 F.3d at 1193.

Indeed, requiring a city to conduct its own studies would require that these conditions already exist, obviating the need for any form of burden shifting analysis. *See Wall Distributors, Inc. v. City of Newport News,* 782 F.2d 1165, 1169-70 n. 7 (4th Cir.1986) (holding that "[t]o insist that governmental interests justifying [adult] use legislation could only be found in specific local experiences and conditions would be unrealistically to require deliberate subjection to those experiences and conditions before attempting to avoid them"). Furthermore, the principle behind the secondary effects doctrine leaves open the possibility that a given jurisdiction may be subjected, at some point in the *future,* to such deleterious effects should a sexually oriented business decide to open an adult establishment in that location.

In this case, Jameson failed to present "actual and convincing evidence" sufficient to cast "direct doubt" on the fiscal court's rationale or findings or that the secondary effects generally associated with sexually oriented businesses are merely a pre-textual justification for the suppression of protected expression. Merely presenting evidence showing a lack of some *local* secondary effects is insufficient to override the fiscal court's rationale and findings. In validating this argument, the Court of Appeals erred.

4. Testimony offered by Jameson's witnesses.

During the hearing before the district court on October 18, 2001, Jameson presented the testimony of several witnesses in an effort to invalidate the secondary effects rationale relied upon by the fiscal court. Such evidence did not attack the county's reliance on the studies, but only some of the county's conclusions as to the probable validity of those studies. The district court then denied Jameson's motion to declare the ordinance unconstitutional, and this ruling was affirmed by the McCracken Circuit Court. The Court of Appeals, however, reversed, and found the testimony given by these witnesses was sufficient to shift the evidentiary burden back to the fiscal court, and Jameson would likewise have this Court find that the testimony and evidence offered was sufficient. We cannot agree, and again we find that the Court of Appeals erred in concluding that the testimony and evidence offered was sufficient to shift the evidentiary burden back to the McCracken County Fiscal Court.

Initially, we note that, at the time of the hearing in the district court, *Alameda Books* had not been decided.

Thus, the burden-shifting analysis set forth in that case was not available at that time. However, this does not change our analysis of the Court of Appeals' decision, nor does it change the outcome of this appeal. With that, we turn to the witnesses and evidence offered by Jameson in his attempt to invalidate the rationale offered by the fiscal court in support of Ordinance No.2000-4.

Mr. Brent Stringer, chief dispatcher for Paducah/McCracken E-911 Communications Services, testified to raw police call data, selected by Jameson's counsel, and which compared the number of calls for police service at Regina's II and The Playhouse to the number of calls for police service at several non-sexually oriented nightclubs in the same area of town. Mr. Stringer also testified that not all criminal investigations are reported on the E-911 call sheets, specifically in regard to undercover investigations. Nor did he testify as to whom, if anyone, would typically call 911 to complain about observing or engaging in illicit sexual behavior or other unwholesome or unhealthy activity on the premises of an adult business.

While the raw police call evidence may certainly be useful for some other purpose, it is insufficient to establish that the fiscal court used elevated crime as a pre-textual justification for the ordinance, if nothing else because it fails to compare incidents occurring in and around sexually oriented businesses to similarly situated establishments. Furthermore, even if true, the evidence still does not disprove that enactment of the ordinance requiring the *de minimis* coverings of pasties and G-strings may reduce criminal activity and further an important governmental interest. *See Kentucky Restaurant Concepts, Inc. v. City of Louisville, Jefferson County, Ky.*, 209 F.Supp.2d 672, 680 (W.D.Ky.2002).

Moreover, Jameson did not attempt to qualify Mr. Stringer as an expert in secondary effects associated with sexually oriented businesses or that he had experience in analyzing raw police call data as it rationally relates to sexually oriented businesses. While Mr. Stringer may be an expert in his designated field of employment, he is not otherwise an expert in this critical area, and thus the Court of Appeals' reliance upon this evidence in finding that Jameson had met his "heavy burden" was erroneous.

Jameson also offered the testimony of Mr. George Wiley, a local real estate agent, who testified to his experience as to the prices paid for various properties sold on the "south side of Paducah" from 1994 to 2001. Significantly, Mr. Wiley merely testified to what property on the "south side of Paducah" is selling for now and that the property was not selling fifteen to twenty years prior to 2001. This evidence failed, however, to provide any historical or scientific relevance that prices for real estate on the "south side of Paducah" had increased or decreased over time, aside from the impact of the entrance of Wal-Mart into the area.

Even were we to accept the Court of Appeals characterization of the evidence concerning property values and reported calls for police service, we would still find the evidence insufficient to shift the evidentiary burden in this case. As we have previously stated, the ordinance would still serve at least one valid governmental interest to satisfy the "substantial government interest" requirement of *O'Brien*. *See, e.g., Fantasyland Video,* 373 F.Supp.2d at 1110; *World Wide Video, Inc.*, 368 F.3d at 1196. Here, that could be, at the least, preventing the transmission of sexually transmitted diseases. This is bolstered by the testimony of Jameson and the owner of another area adult

establishment that they had rules in place to prevent contact between dancers and patrons. Furthermore, "[a]lthough this evidence shows that the [fiscal court] might have reached a different conclusion regarding the relationship between adverse secondary effects and sexually oriented businesses, it is not sufficient to vitiate the result reached in the [fiscal court's] legislative process." *G.M. Enterprises, Inc. v. Town of St. Joseph, Wisconsin,* 350 F.3d 631, 639 (7th Cir.2003).

We note that *Alameda Books* does not require this court to re-weigh the evidence relied upon by the fiscal court, "nor does it empower a court to substitute its judgment in regards to whether a regulation will best serve a community, so long as the regulatory body has satisfied the *Renton* requirement that it consider evidence 'reasonably believed to be relevant to the problem' addressed." *G.M. Enterprises,* 350 F.3d at 639-40 (citing *Renton,* 475 U.S. at 51-52, 106 S.Ct. 925, 89 L.Ed.2d 29; *Alameda Books,* 535 U.S. at 445, 122 S.Ct. 1728, 152 L.Ed.2d 670 (Kennedy, J., concurring)). The judiciary should not second-guess the judgment of local government officials. *See Alameda Books,* 535 U.S. at 451, 122 S.Ct. at 1743 (Kennedy, J., concurring). And, substantial deference is afforded local officials in their assessments and inferences of solutions to problems within their city. *See Heideman,* 348 F.3d at 1199. Furthermore,

> [t]o cast direct doubt, the challenger must present evidence that is *directly contrary* to the municipality's evidence, not simply produce a general study refuting all secondary effects. This is not a new or heightened evidentiary standard as this interpretation is consistent with the holding in *Renton,* which established the proper evidentiary burden of the parties.

City of Elko v. Abed, 677 N.W.2d 455, 465 (Minn.App.2004). Moreover, we find, as others courts have likewise found, that *Alameda Books, supra,* did not create a new evidentiary standard. *See Giovani Carandola, Ltd. v. Bason,* 303 F.3d 507, 516 (4th Cir.2002) (finding that a city or state carries a minimal burden in establishing a substantial government interest); *Baby Dolls Topless Saloons, Inc. v. City of Dallas,* 295 F.3d 471, 481 (5th Cir.2002) (finding that empirical data is not required to show that the ordinance will lower crime rates); *Ben's Bar, Inc. v. Village of Somerset,* 316 F.3d 702, 721-22 (7th Cir.2003) (citing Justice Kennedy's concurrence in *Alameda Books* wherein he opined that a municipality's burden in establishing a substantial government interest is slight); *City of Elko v. Abed,* 677 N.W.2d 455, 465 (Minn.App.2004) (concluding that *Alameda Books* did not establish a "new" evidentiary standard).

Finally, we note that were we to accept the Court of Appeals' reading of *Alameda Books,* the burden would shift to the municipality to proffer supplemental evidence as justification for a regulation whenever a challenger presents evidence which casts *any* doubt on the municipality's rationale. "Parties to these cases would [then] be on a never-ending merry-go-round of burden shifting." *Abed,* 677 N.W.2d at 464.

For the reasons outlined above, we find that McCracken County Ordinance No.2000-4 satisfies the second prong of *O'Brien* in that the ordinance furthers the county's substantial governmental interest in preventing and combating the negative secondary effects associated with sexually oriented businesses. Furthermore, Appellee Jameson has not presented evidence sufficient to shift the evidentiary burden back to the fiscal court by creating a

jury issue that the rationale relied upon by the legislative body during its enactment was a pretext for suppression. The Court of Appeals erred in concluding otherwise.

CONCLUSION

For the reasons set forth herein, we reverse the judgment of the Court of Appeals insofar as it remands this case to the district court for further evidentiary hearings and requires the McCracken County Fiscal Court to proffer supplementary evidence in support of Ordinance No.2000-4, and thus we reinstate the prior holding of the district court regarding the constitutionality of the ordinance.

All concur.

Supreme Court of Kentucky

No. 2004-SC-000983-DG

COMMONWEALTH OF KENTUCKY APPELLANT

V. ON REVIEW FROM COURT OF APPEALS
NO. 2003-CA-000967
MCCRACKEN CIRCUIT COURT NO. 02-XX-00004

EDWARD GREEN JAMESON APPELLEE

ORDER

Appellee's motion for leave to file an additional supplemental authority, in the above-styled action, is denied.

ENTERED: November 15, 2006.

/s/ Joseph E. Lambert
Chief Justice

RENDERED: August 6, 2004; 10:00 a.m.
TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-000967-DG

EDWARD GREEN JAMESON APPELLANT

ON DISCRETIONARY REVIEW
FROM MCCRACKEN CIRCUIT COURT
v. HONORABLE R. JEFFREY HINES, JUDGE
ACTION NOS. 00-M-01796, 00-M-01797
AND 02-XX-00004

COMMONWEALTH OF KENTUCKY APPELLEE

OPINION
AFFIRMING IN PART, VACATING IN PART
AND REMANDING

** ** ** ** **

BEFORE: BUCKINGHAM, JOHNSON AND KNOPF, JUDGES.

JOHNSON, JUDGE: Edward Green Jameson has petitioned for review from an order of the McCracken Circuit Court entered on April 10, 2003, which affirmed an order of the McCracken District Court denying Jameson's motion to declare McCracken County Ordinance No. 2000-4 unconstitutional and to dismiss the criminal complaint against him.[1] Having concluded that recent case law from

[1] After Jameson's motion to declare Ordinance No.2000-4 unconstitutional was denied by the district court, Jameson entered a conditional plea of guilty to the charges against him, while preserving his right to appeal to the circuit court the determination as to the ordinance's constitutionality. Hence, as compared to other cases dealing with the

(Continued on following page)

the Supreme Court of the United States requires that this matter be remanded for further fact-finding, but that the McCracken District Court did not otherwise err by denying Jameson's motion, we affirm in part, vacate in part and remand for further proceedings.

McCracken County Ordinance No. 2000-4 became effective on April 26, 2000.[2] The ordinance provided for the "regulation of sexually oriented businesses and their employees." Among other things, the ordinance classified certain establishments as falling within the definition of what was termed an "Adult Cabaret."[3] The ordinance

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constitutionality of regulations which target sexually-oriented businesses, the case at bar arrives before us in a somewhat unusual manner. Typically, when a First Amendment challenge is made against a regulation which targets sexually-oriented businesses, the aggrieved party will file an original action at the circuit court level seeking injunctive relief to prohibit the enforcement of the regulation at issue. *See, e.g., Restaurant Ventures, LLC v. Lexington-Fayette Urban County Government,* Ky.App., 60 S.W.3d 572, 575 (2001) (noting that "[s]everal adult entertainment establishments and their employees brought [an action in Fayette Circuit Court] challenging the constitutionality of ordinances enacted by the Lexington-Fayette Urban County Government"); and *Schultz v. City of Cumberland,* 228 F.3d 831, 839 (7th Cir. 2000) (noting that "plaintiffs sued Cumberland in [federal] district court seeking a permanent injunction against enforcement of the" regulation in question).

[2] Ordinance No. 2000-4 was enacted by the McCracken County Fiscal Court.

[3] Ordinance No. 2000-4(II)(3) provides in full as follows:

> "Adult Cabaret" means a night club, bar, restaurant, or similar commercial establishment which regularly features:
>
> (a) Persons who appear in a state of nudity or semi-nude; or
>
> (b) Live performance[s] which are characterized by the exposure of "specified anatomical areas" or by "specified sexual activities"; or

(Continued on following page)

restricted the times during which an adult cabaret could remain open for business,[4] and provided for the regulation of any "live performances" that might take place within the establishment. According to the terms of the ordinance, it was aimed at controlling the alleged negative, secondary effects associated with sexually-oriented businesses, *e.g.*, increased crime rates and decreased property values in and around the areas where such businesses are located.

In August 2000 Jameson was employed as a manager of Regina's II[5] in Paducah, McCracken County, Kentucky. There is no dispute that Regina's II, which featured live exotic dancing, was an "Adult Cabaret" as defined by Ordinance No. 2000-4 On August 19, 2000, Jameson was criminally charged by a member of the McCracken County Sheriff's Department for various violations of Ordinance No. 2000-4. Specifically, Jameson was cited for operating past the 1:00 a.m. mandatory closing time, for permitting the dancers to appear totally nude while performing, and for allowing physical contact between the dancers and the patrons.

On October 31, 2000, Jameson filed a motion with the McCracken District Court, asking the court to declare

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(c) Films, motion pictures, video cassettes, slides, or other photographic reproductions which are characterized by the depiction or description of "specified sexual activities" or "specified anatomical areas".

[4] Ordinance No. 2000-4(IV)(e) provided that "[n]o establishment, except for an adult motel, shall remain open at any time between the hours of one o'clock (1:00) a.m. and six o'clock (6:00) a.m."

[5] According to the record, Regina's II was owned by Nightclubs, Inc.

Ordinance No. 2000-4 unconstitutional on its face and as applied to him, and to dismiss the criminal complaint against him. Jameson argued that Ordinance No. 2000-4 violated several provisions of the United States Constitution and the Kentucky Constitution. Jameson argued, *inter alia,* that Ordinance No. 2000-4 as applied to him imposed an impermissible burden on his right to freedom of expression as guaranteed by the First Amendment to the United States Constitution and Section 1 of the Kentucky Constitution.

Approximately one year later, on October 18, 2001, an evidentiary hearing on the matter was held before the district court. During this hearing, Jameson introduced evidence in an attempt to show that the alleged negative, secondary effects associated with sexually-oriented businesses were not present in and around the area of Regina's II. Jameson argued that this evidence supported his claim that Ordinance No. 2000-4 was not enacted to combat these secondary effects, but that it was instead enacted specifically to prohibit nude dancing and related forms of expression.

On May 31, 2002, the district court entered an order denying Jameson's motion to declare Ordinance No. 2000-4 unconstitutional and to dismiss the criminal complaint against him. On July 2, 2002, Jameson entered a conditional plea of guilty to the various charges against him, while preserving his right to appeal the denial of his motion to declare the ordinance unconstitutional. Jameson was sentenced to 90 days in jail, which was probated for a period of two years, and fined $500.00.

Jameson appealed to the McCracken Circuit Court and once again argued that Ordinance No. 2000-4 as

applied to him was an unconstitutional restraint on his freedom of expression. On April 10, 2003, the circuit court entered an order affirming the district court's denial of Jameson's motion to declare Ordinance No. 2000-4 unconstitutional. Jameson subsequently filed a motion seeking discretionary review with this Court, which was granted on October 14, 2003.

Jameson raises several arguments on appeal. He first claims that Section VII(b) of the ordinance, which is among those provisions regulating live performances, is "a content-based regulation of speech," and must therefore be subjected to strict judicial scrutiny. Section VII(b) of the ordinance states in full as follows:

> No person shall appear nude or in a state of nudity while engaged in any live performance on the premises of any sexually oriented business.[6]

"Nude" or "state of nudity" is further defined in Section II (15) as:

> [T]he showing of the human male or female genitals, pubic area, vulva, anus, anal cleft or cleavage with less than a fully opaque covering, the showing of the female breast with less than a fully opaque covering of any part of the nipple, or the showing of the covered male genitals in a discern[i]bly turgid state.

Jameson claims that Section VII(b)'s purpose "is specifically and solely to ban nude dancing in sexually

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[6] Section II(20) defines "Sexually Oriented Business" as "an adult amusement arcade, adult book store, adult novelty store, adult video store, adult cabaret, adult motel, adult motion picture theater, adult stage theater, escort agency, or sexual encounter center."

oriented businesses; a specific type of speech at a specific type of establishment." Hence, Jameson argues that this provision represents a regulation of the particular message involved and that it must therefore be subjected to strict judicial scrutiny.[7] Thus, Jameson contends that the district court erred by not analyzing Section VII(b) pursuant to a strict scrutiny standard. While we agree that Section VII(b) is a content-based regulation of speech, we do not agree that strict scrutiny is the correct standard to be used to determine the constitutionality of this provision.

As an initial matter, we note that exotic dancing is generally considered to be a form of expression which enjoys at least some protection under the First Amendment. In *Barnes v. Glen Theatre, Inc.*,[8] Chief Justice Rehnquist in writing for the plurality stated that "nude dancing of the kind sought to be performed here is expressive conduct within the outer perimeters of the First Amendment, though we view it as only marginally so." In the case *sub judice*, the Commonwealth has conceded that,

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[7] *See Texas v. Johnson*, 491 U.S. 397, 403, 109 S.Ct. 2533, 2539, 105 L.Ed.2d 342 (1989) (stating that if a regulation is related to expression, intermediate scrutiny is not appropriate and a more "demanding" standard is required).

[8] 501 U.S. 560, 566, 111 S.Ct. 2456, 2460, 115 L.Ed.2d 504 (1991) (plurality opinion). *See also Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 66, 101 S.Ct. 2176, 2181, 68 L.Ed.2d 671 (1981) (stating that "nude dancing is not without its First Amendment protections from official regulation"); and *City of Erie v. Pap's A.M.*, 529 U.S. 277, 289, 120 S.Ct. 1382, 1391, 146 L.Ed.2d 265 (2000) (plurality opinion) (stating that "[b]eing 'in a state of nudity' is not an inherently expressive condition. As we explained in *Barnes*, however, nude dancing of the type at issue here is expressive conduct, although we think that it falls only within the outer ambit of the First Amendment's protection").

from a factual standpoint, the type of exotic dancing featured at Regina's II fell within this particular realm of protected speech.

Thus, since the First Amendment is in fact implicated, we turn to determining whether strict scrutiny analysis is required. The Supreme Court of the United States has provided lower courts with two somewhat differing, yet overlapping standards by which to determine the constitutionality of regulations specifically targeting sexually-oriented businesses. Due to the complexity of these standards, a review of the development of the Supreme Court's jurisprudence in this area is in order.

We first turn to the Supreme Court's treatment of zoning ordinances which specifically target sexually-oriented businesses. In *Young v. American Mini Theatres, Inc.*,[9] the Supreme Court considered a First Amendment challenge to a portion of the City of Detroit's zoning ordinance which required that "adult" theaters "not be located within 1,000 feet of any two other 'regulated uses' or within 500 feet of a residential area" [footnote omitted).[10] Although a majority of the justices could not agree on a single rationale, a majority of the Court did recognize that even though the adult theaters were singled out under the zoning laws because of the content of the films that were shown in those establishments, the city could constitutionally regulate the businesses in that manner

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[9] 427 U.S. 50, 96 S.Ct. 2440, 49 L.Ed.2d 310 (1976).

[10] 427 U.S. at 52.

since the purpose was to control the negative, secondary effects associated with such establishments.[11]

Approximately ten years later, the Supreme Court upheld a similar zoning ordinance in *City of Renton v. Playtime Theatres, Inc.*[12] The Court invoked a three-step analysis in upholding the city's zoning ordinance. First, since the ordinance did "not ban adult theaters altogether," but merely regulated where the theaters could be located, "[t]he ordinance [could be] properly analyzed as a form of time, place, and manner regulation."[13] The Court next asked whether the ordinance was content-based or content-neutral. If the Court determined that the ordinance was content-neutral, it would be upheld "so long as [it was] designed to serve a substantial governmental interest and [did] not unreasonably limit alternative avenues of communication."[14]

In determining whether the ordinance was content-based or content-neutral, the Court noted that the ordinance did "not appear to fit neatly into either the

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[11] *Id.* 427 U.S. at 62-63 (holding that "[p]utting to one side for the moment the fact that adult motion picture theaters must satisfy a locational restriction not applicable to other theaters, we are also persuaded that the 1,000-foot restriction does not, in itself, create an impermissible restraint on protected communication. The city's interest in planning and regulating the use of property for commercial purposes is clearly adequate to support that kind of restriction applicable to all theaters within the city limits. In short, apart from the fact that the ordinances treat adult theaters differently from other theaters and the fact that the classification is predicated on the content of material shown in the respective theaters, the regulation of the place where such films may be exhibited does not offend the First Amendment").

[12] 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986).

[13] 475 U.S. at 46.

[14] *Id.* 475 U.S. at 47.

'content-based' or the 'content-neutral' category."[15] However, in keeping with its prior decision in *American Mini Theatres,* the Court held that even though "the ordinance treats theaters that specialize in adult films differently from other kinds of theaters[,]" the ordinance was nonetheless "completely consistent with our definition of 'content-neutral' speech regulations[.]"[16] Therefore, the Court held that the ordinance, which was aimed at combating the negative, secondary effects associated with sexually-oriented businesses, would be subjected to review under the standards reserved for "content-neutral" time, place and manner regulations.[17] Finally, in the third step of its analysis, the Court held that the ordinance did serve a substantial governmental interest without unreasonably limiting alternative avenues of communication.

Hence, *American Mini Theatres* and *Renton* both stand for the proposition that a content-based zoning ordinance targeting sexually-oriented businesses may nevertheless be *treated like* a content-neutral regulation if the ordinance is aimed at combating the negative, secondary effects associated with such businesses.[18] In other

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[15] *Id.*

[16] *Id.* 475 U.S. at 47-48.

[17] *Id.* 475 U.S. at 49 (stating that "[i]t was with this understanding in mind that, in *American Mini Theatres,* a majority of this Court decided that, at least with respect to businesses that purvey sexually explicit materials, zoning ordinances designed to combat the undesirable secondary effects of such businesses are to be reviewed under the standards applicable to 'content-neutral' time, place, and manner regulations").

[18] As some lower federal courts have noted, the better reading of *Renton* is that the Court treated a technically content-based regulation as if it were a content-neutral regulation. *See Richland Bookmart, Inc. v. Nichols,* 137 F.3d 435, 440 (6th Cir. 1998) (stating that "[o]ver the last

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words, since these ordinances do not totally prohibit sexually-oriented businesses, but merely restrict the areas in which these businesses may be located, the ordinances are not subjected to strict scrutiny analysis. Rather, since the ordinances are aimed at combating the negative, secondary effects associated with such businesses, they are instead subjected to an intermediate level standard of review.

We next turn to the Supreme Court's consideration of regulations governing nudity. In *Barnes,* the regulation at issue was an Indiana statute "proscribing public nudity across the board."[19] As applied to establishments featuring exotic dancing, the statute had the effect of requiring the dancers to wear "pasties" and "G-strings." The Court upheld the statute, but found itself fragmented, with no

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decade, some courts reviewing these type of regulations started simply referring to them as content-neutral without explaining, as the Supreme Court carefully did in both *American Mini Theatres* and *City of Renton,* that they are in fact content-based but are to be *treated* like content-neutral regulations for some purposes. Thus, in some cases, a kind of legal fiction has been created that calls regulation of such literature 'content neutral' when what is meant is only that the regulation is constitutionally valid [emphasis original] [citations omitted]"); and *DiMa Corp. v. Town of Hallie,* 185 F.3d 823, 828 (7th Cir. 1999) (discussing *Renton* and stating that "[t]he Court held that regulation of sexually explicit material would be treated *like* content-neutral time, place, and manner regulations, not that it *was* content-neutral [emphases original]"). *See also City of Los Angeles v. Alameda Books, Inc.,* 535 U.S. 425, 448, 122 S.Ct. 1728, 1741, 152 L.Ed.2d 670 (2002) (Kennedy, J., concurring in the judgment) (noting that designating ordinances like those at issue in *Renton* as being content-neutral "was something of a fiction," but that despite the fact that such ordinances are in reality content-based, "the central holding of *Renton* is sound: A zoning restriction that is designed to decrease secondary effects and not speech should be subject to intermediate rather than strict scrutiny").

[19] 501 U.S. at 566.

single rationale uniting a majority of the justices. However, as lower federal courts have noted, Justice Souter's opinion concurring in the judgment was "on the narrowest grounds," and therefore became "binding" on lower courts.[20]

Justice Souter agreed with the plurality that the less stringent test as announced in *United States v. O'Brien*,[21] should be the standard by which to determine the statute's constitutionality. In *O'Brien*, the Court announced a four-pronged test for determining the constitutionality of regulations that were aimed at conduct, but which also had the effect of placing incidental limitations on speech:

> [A] government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.[22]

With respect to the second prong from *O'Brien*, Justice Souter cited the Court's previous holding in *Renton* and stated that "substantial governmental interests" should include goals of "preventing prostitution, sexual assault,

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[20] *See DLS, Inc. v. City of Chattanooga*, 107 F.3d 403, 408-09 (6th Cir. 1997) (citing *Marks v. United States*, 430 U.S. 188, 193, 97 S.Ct. 990, 993-94, 51 L.Ed.2d 260 (1977) (instructing lower courts that where no single opinion unites a majority of the Court, they should follow the opinion concurring in the judgment on the narrowest grounds)).

[21] 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968).

[22] 391 U.S. at 377.

and other criminal activity" that is associated with sexually-oriented businesses.[23] Hence, Justice Souter concluded that Indiana's public nudity ban could be constitutionally applied to prohibit totally nude dancing in order to further the state's interest in controlling the negative, secondary effects that sexually-oriented businesses had on the surrounding areas of the community.

Finally, with respect to the fourth prong from *O'Brien,* Justice Souter stated that it too had been satisfied:

> The fourth *O'Brien* condition, that the restriction be no greater than essential to further the governmental interest, requires little discussion. Pasties and a G-string moderate the expression to some degree, to be sure, but only to a degree. Dropping the final stitch is prohibited, but the limitation is minor when measured against the dancer's remaining capacity and opportunity to express the erotic message.[24]

Subsequently, in *Pap's A.M.,* a four-justice plurality once again applied the *O'Brien* test in upholding a city ordinance prohibiting persons from appearing in public "in a state of nudity."[25] As in *Barnes,* exotic dancers were compelled to wear "pasties" and "G-strings" in order to comply with the terms of the ordinance while performing in sexually-oriented businesses. In writing for the four-justice plurality, Justice O'Connor stated that applying the ban to prohibit totally nude dancing was justified on grounds that "the ordinance seeks to deter crime and the

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[23] *Barnes,* 501 U.S. at 583.

[24] *Id.* 501 U.S. at 587.

[25] *Pap's A.M.,* 529 U.S at 283.

other deleterious effects caused by the presence of such an establishment in the neighborhood."[26]

In discussing the fourth prong of the *O'Brien* test, Justice O'Connor stated:

> The fourth and final *O'Brien* factor – that the restriction is no greater than is essential to the furtherance of the government interest – is satisfied as well. The ordinance regulates conduct, and any incidental impact on the expressive element of nude dancing is *de minimis*. The requirement that dancers wear pasties and G-strings is a minimal restriction in furtherance of the asserted government interests, and the restriction leaves ample capacity to convey the dancer's erotic message.[27]

Thus, as in *Barnes,* the ordinance in *Pap's A.M.* withstood a First Amendment challenge.

Therefore, both *Barnes* and *Pap's A.M.* stand for the proposition that a content-neutral, general ban on public nudity may be constitutionally applied to prohibit totally nude dancing in order to combat the negative, secondary effects associated with sexually-oriented businesses. Under both of these cases, the Supreme Court applied an intermediate level standard of review in upholding the regulations at issue. Finally, both *Barnes* and *Pap's A.M.* indicate that requiring exotic dancers to wear pasties and G-strings has a *de minimis* impact on the message being conveyed.

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[26] *Id.* 529 U.S. at 293.

[27] *Id.* 529 U.S. at 301.

The preceding summary shows that the Supreme Court has developed two somewhat distinguishable, yet overlapping standards to guide lower courts when determining the constitutionality of regulations targeting sexually-oriented businesses. As the Court in *Barnes* noted, the *Renton*-type time, place and manner test "has been interpreted to embody much the same standards as those set forth in [*O'Brien*]."[28] Thus, having established a basic framework, we now apply the aforementioned principles to Section VII(b).

As we mentioned above, Section VII(b) prohibits a person from appearing nude or in a state of nudity "while engaged in any live performance on the premises of any sexually oriented business." Thus, unlike the statute at issue in *Barnes,* and the ordinance at issue in *Pap's A.M.,* Section VII(b) is not a content-neutral ban on nudity. Rather, Section VII(b) only prohibits nudity in a sexually-oriented business if an individual is "engaged in any live performance." Apparently, under the terms of this provision, an individual would not be in violation of Section VII(b) if she appeared nude while merely serving drinks to

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[28] *See Barnes,* 501 U.S. at 566; *Clark v. Community for Creative Non-Violence,* 468 U.S. 288, 298, 104 S.Ct. 3065, 3071, 82 L.Ed.2d 221 (1984) (noting that there is little, if any, difference between the four-pronged *O'Brien* test and the standard applied to time, place and manner restrictions); and *Ben's Bar, Inc. v. Village of Somerset,* 316 F.3d 702, 714 (7th Cir. 2003) (stating that "the analytical frameworks and standards utilized by the Court in evaluating adult entertainment regulations, be they zoning ordinances or public indecency statutes, are virtually indistinguishable"). *But see Peek-A-Boo Lounge of Bradenton, Inc. v. Manatee County, Florida,* 337 F.3d 1251, 1265 n.13 (11th Cir. 2003) (analyzing a zoning ordinance governing sexually oriented business pursuant to the *Renton* time, place and manner standard, and an ordinance governing public nudity under the *O'Brien* standard).

the patrons. Therefore, since Section VII(b)'s ban on nudity is content-based, it does not fit squarely under the *Barnes* and *Pap's A.M.* mode of analysis.

Similarly, Section VII(b) is not a zoning-type regulation which merely restricts the availability of exotic dancing to certain locations within the county; it is a complete ban on totally nude live performances on the premises of sexually-oriented businesses. Thus, the Supreme Court's *Renton*-type analysis would also seem to be inapplicable. Hence, at first blush, it would appear that Section VII(b) should be subjected to a strict scrutiny standard of review. However, taking into account the overlapping nature of the two standards discussed above, we hold that Section VII(b) may be properly analyzed pursuant to an intermediate level standard of review.

In both Justice Souter's concurring opinion in *Barnes,* and Justice O'Connor's plurality opinion in *Pap's A.M.,* the "secondary effects" rationale from *Renton* was extended to justify the application of an intermediate level of scrutiny to the Court's consideration of public nudity bans. In both cases, the application of the general public nudity bans against sexually-oriented businesses was upheld in light of the governments' efforts to control the negative, secondary effects associated with such businesses.

In the case *sub judice,* Ordinance No. 2000-4 is clearly aimed at controlling those same negative, secondary effects. The McCracken County Fiscal Court made several findings linking the presence of sexually-oriented businesses in an area to decreased property values, increased crime rates, and increased risks of the spread of sexually-transmitted diseases. Accordingly, a logical extension of *Renton, Barnes,* and *Pap's A.M.* is that a prohibition on

totally nude dancing, although content-based, may nevertheless be subjected to an intermediate level standard of review if the regulation is aimed at controlling the negative, secondary effects associated with sexually-oriented businesses.

While it is true that Section VII(b) effectuates a complete ban on totally nude dancing, whereas the ordinance at issue in *Renton* did not ban adult theaters altogether, we conclude that the "*de minimis*" language from *Barnes* and *Pap's A.M.* further justifies the application of an intermediate level standard of review. For example, in *Pap's A.M.*, the plurality stated that any "muting" of the erotic message that took place by prohibiting the "last stitch" from being dropped during an exotic dance was *de minimis*.[29]

Under Ordinance No. 2000-4, exotic dancers are permitted to perform "semi-nude."[30] Similar to the situations in *Barnes* and *Pap's A.M.*, this has the effect of requiring female dancers to wear pasties and G-strings. Therefore, in keeping with the decisions in *Barnes* and *Pap's A.M.*, as between totally nude exotic dancing and exotic dancing that is accompanied by pasties and

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[29] *Pap's A.M.*, 529 U.S. at 294.

[30] Section II(17) defines "semi-nude" as follows:

> "Semi-nude" or in a "semi-nude condition" means the showing of the female breast below a horizontal line across the top of the areolae at its highest point or the showing of the male or female buttocks. This definition shall include the entire lower portion of the human female breast, but shall not include any portion of the cleavage of the human female breast exhibited by a dress, blouse, skirt, leotard, bathing suit, or other wearing apparel provided the areolae is not exposed in whole or in part.

G-strings, we hold that any muting of the erotic message that occurs by prohibiting the totally nude exotic dancing is *de minimis*.[31] Accordingly, Section VII(b) may be appropriately analyzed pursuant to an intermediate level standard of review.

We find support for this result in *Fly-Fish, Inc. v. City of Cocoa Beach*.[32] In *Fly-Fish*, the United States Court of Appeals for the Eleventh Circuit considered a constitutional challenge to a city ordinance prohibiting employees of sexually-oriented businesses from appearing totally nude within those establishments. The Eleventh Circuit held that although the ordinance was clearly content-based, inasmuch as it specifically targeted nude dancing,[33] it would nonetheless be subjected to an intermediate level standard of review. The Court stated that since the ordinance merely regulated the manner in which the erotic message was conveyed, *i.e.*, it did not prohibit exotic dancing, but merely required that there be "more clothing on the messenger," and that since any muting of the message caused by a ban on total nudity was *de minimis*,

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[31] This holding is further bolstered by different language from *Barnes* and *Pap's A.M.*, which indicates that nude dancing is only "marginally" protected by, or within the "outer ambits of" the First Amendment. *See Barnes*, 501 U.S. at 566; and *Pap's A.M.*, 529 U.S. at 289.

[32] 337 F.3d 1301 (11th Cir. 2003).

[33] Similar to the ordinance in the instant case, the ordinance at issue in *Fly-Fish* was not a content-neutral ban on public nudity in general, but was instead a ban on nudity within sexually-oriented businesses only. *Id.* at 1306.

an intermediate level standard of review was appropriate.[34]

Therefore, Section VII(b) may be appropriately analyzed pursuant to an intermediate level standard of review. Accordingly, the district court did not err by denying Jameson's request to apply a strict scrutiny standard of review.

We next turn to Jameson's claim that if we determine that intermediate scrutiny is the appropriate standard of review, the case must nonetheless be remanded to the district court in light of the Supreme Court's recent decision in *Alameda Books*.[35] We agree.

In *Alameda Books*, the Supreme Court's plurality opinion clarified the procedure involved when a party has challenged a regulation targeting the secondary effects associated with sexually-oriented businesses:

> In *Renton*, we . . . held that a municipality may rely on any evidence that is "reasonably believed to be relevant" for demonstrating a connection between speech and a substantial, independent government interest. This is not to say that a

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[34] *Id.* at 1308. *See also Schultz*, 228 F.3d at 847 (applying intermediate level scrutiny to a content-based ordinance prohibiting employees of sexually-oriented businesses from appearing nude within those establishments and stating that "[i]nsofar as [the ordinance] prohibits full nudity and requires dancers to wear pasties and G-strings while performing, [the ordinance] does not offend the First Amendment").

[35] 535 U.S. at 425. *Alameda Books* was rendered on May 13, 2002. In the case at bar, the district court's order denying Jameson's motion to declare Ordinance No. 2000-4 unconstitutional was entered on May 31, 2002. Our review of the briefs filed with the district court shows that it was likely not aware of the *Alameda Books* decision prior to denying Jameson's motion.

> municipality can get away with shoddy data or reasoning. The municipality's evidence must fairly support the municipality's rationale for its ordinance. If plaintiffs fail to cast direct doubt on this rationale, either by demonstrating that the municipality's evidence does not support its rationale or by furnishing evidence that disputes the municipality's factual findings, the municipality meets the standard set forth in *Renton. If plaintiffs succeed in casting doubt on a municipality's rationale in either manner, the burden shifts back to the municipality to supplement the record with evidence renewing support for a theory that justifies its ordinance* [citations omitted] [emphasis added].[36]

The Supreme Court has noted that when enacting ordinances aimed at combating the negative, secondary effects associated with sexually-oriented businesses, cities are entitled to rely on studies from other municipalities and even prior court precedents which tend to establish the link between sexually-oriented businesses and those negative, secondary effects.[37] However, as *Alameda Books*

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[36] 535 U.S. at 438-39.

[37] *See Pap's A.M.*, 529 U.S. at 296-97 stating:

> [I]n terms of demonstrating that such secondary effects pose a threat, the city need not 'conduct new studies or produce evidence independent of that already generated by other cities' to demonstrate the problem of secondary effects, 'so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses.' Because the nude dancing at Kandyland is of the same character as the adult entertainment at issue in *Renton, American Mini Theatres,* and *California v. LaRue,* 409 U.S. 109, 93 S.Ct. 390, 34 L.Ed.2d 342 (1972), it was reasonable for Erie to conclude that such nude dancing was likely to produce the same secondary effects. And Erie could

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makes clear, if a party challenging the regulation casts doubt on the city's pre-enactment rationale, the burden shifts back to the city to proffer supplemental evidence justifying the regulation.

In *Peek-A-Boo Lounge,* the United States Court of Appeals for the Eleventh Circuit noted that "[t]he significance of *Alameda Books* is that it clarifies how the court is to interpret the third step of the *Renton* analysis as well as the second prong of the *O'Brien* test," *i.e.,* the reviewing court must determine whether the legislative body can proffer supplementary evidence tending to show that the challenged regulation furthers a substantial governmental interest without unreasonably limiting alternative avenues of communication.[38] Accordingly, post-*Alameda Books,* when a party successfully casts doubt on a government's pre-enactment rationale for regulating sexually-oriented businesses, legislative bodies are required to supplement their evidence before the court to show that the challenged regulation furthers the government's interest in combating the negative, secondary effects associated with sexually-oriented businesses.

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reasonably rely on the evidentiary foundation set forth in *Renton* and *American Mini Theatres* to the effect that secondary effects are caused by the presence of even one adult entertainment establishment in a given neighborhood. In fact, Erie expressly relied on *Barnes* and its discussion of secondary effects, including its reference to *Renton* and *American Mini Theatres.* Even in cases addressing regulations that strike closer to the core of First Amendment values, we have accepted a state or local government's reasonable belief that the experience of other jurisdictions is relevant to the problem it is addressing" [citations omitted].

[38] 337 F.3d at 1264-65.

In the instant case, our review of the record shows that Jameson presented unrebutted evidence before the district court which tended to cast doubt on the fiscal court's pre-enactment justifications for Section VII(b). For example, Brent Stringer, chief dispatcher for Paducah/McCracken E-911 Communications Services, offered records from his department indicating that the number of times local police officers had been asked to respond to various incidents at Regina's II and The Playhouse, two sexually-oriented businesses, was lower than at two non-sexually-oriented nightclubs in the same area of the city. In addition, Jameson offered the deposition testimony of George Wiley, a realtor, who stated that property values in and around the area where Regina's II was located had actually increased over time. Finally, Jameson presented the testimony of Joann Warner, owner of The Playhouse, and Melissa Meyer, an employee of The Playhouse. Both women testified regarding various rules and regulations that were in place to prevent the spread of sexually-transmitted diseases at that establishment.

Hence, in light of *Alameda Books,* we conclude that Jameson's unrebutted evidence was sufficient to cast doubt on the fiscal court's pre-enactment rationale for Section VII(b). In the face of such evidence, the burden has shifted back to the fiscal court to proffer supplementary evidence justifying the regulation. However, since *Alameda Books* had not yet been rendered at the time of the evidentiary hearing conducted on October 18, 2001, the fiscal court must be given an opportunity to respond to Jameson's evidence. Accordingly, a remand of this matter to the district court is necessary to determine whether the fiscal court can proffer supplementary evidence indicating that Section VII(b)'s ban on totally nude dancing furthers

a substantial governmental interest *in McCracken County* without unreasonably limiting alternative avenues of communication.[39] On remand, the fiscal court's legislative judgment should be upheld as long as the evidence upon which it relies is credible.[40]

We next turn to Jameson's claim that Ordinance No. 2000-4, as a whole, represents an example of "arbitrary legislation," which, according to Jameson, violates Section 2 of the Kentucky Constitution. In support of this argument, Jameson restates his previous assertions that the fiscal court acted improperly by (1) initially enacting Ordinance No. 2000-4 without establishing a specific link between sexually-oriented businesses and negative, secondary effects in McCracken County; and (2) by failing to produce evidence at the October 18, 2001, hearing justifying the enactment of Ordinance No. 2000-4.

To the extent Jameson is asking for the same type of relief he seeks with respect to his federal constitutional arguments, our preceding analysis renders this claim

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[39] *See id.* at 1273 (stating that "in light of our finding that the Adult Lounges have managed to cast direct doubt on the County's rationale for adopting Ordinance 99-18, the District Court must decide by a preponderance of the available evidence (including whatever additional evidence the County places in the record) whether there remains credible evidence upon which the County could reasonably rely in concluding that the ordinance would combat the secondary effects of adult entertainment establishments *in Manatee County*. The burden lies with the County in this regard" [emphasis added]).

[40] *Id.* (stating that on remand, "the District Court should be careful not to substitute its own judgment for that of the County. The County's legislative judgment should be upheld provided that the County can show that its judgment is still supported by credible evidence, upon which the County reasonably relies").

moot, and we need not address this issue any further.[41] To the extent Jameson is requesting additional relief,[42] Jameson has not attacked any specific provision within Ordinance No. 2000-4 as being arbitrary and in violation of Section 2. Accordingly, we decline to discuss the merits of this argument on appeal.

Next, we address Jameson's claim that since the regulations prohibiting nude dancing only apply to "sexually oriented businesses," Ordinance No. 2000-4 is a violation of the Equal Protection Clause of the Kentucky Constitution.[43] Specifically, Jameson argues:

> [A]ny business in McCracken County can have nude entertainment as long as it is not considered part of the regular performances due to the fact that it does not fall within the definition of a sexually oriented business. Such a distinction without any rational relation is discriminatory.

As this Court has previously noted, the negative, secondary effects associated with sexually-oriented businesses are unique to those establishments.[44] Therefore, the fiscal court could have reasonably concluded that an establishment which regularly features adult entertainment would be more likely to attract the negative, secondary

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[41] *See Murphy v. Commonwealth*, Ky., 50 S.W.3d 173, 184 (2001) (stating that issues raised on appeal which are rendered moot "require no further discussion").

[42] It is unclear whether Jameson's Section 2 constitutional claim is offered as a request for additional relief, or as an alternative basis for invalidating the ordinance.

[43] See Ky. Const. § 3.

[44] *See Restaurant Ventures*, 60 S.W.3d at 579 (rejecting a similar Equal Protection Clause argument).

effects associated with sexually-oriented businesses than an establishment which only occasionally features adult-type entertainment. Accordingly, we reject Jameson's claim that such a distinction is "without any rational relation," and violative of the Equal Protection Clause of the Kentucky Constitution.

Jameson next claims that Ordinance No. 2000-4 is unconstitutionally overbroad, and that Section VII(d), which prohibits physical contact between customers and dancers, is unconstitutionally vague. We reject both contentions.

With respect to Jameson's overbreadth claim, he appears to argue that since some "mainstream" movies shown in conventional theaters depict sexual activities which would not be permitted at Regina's II, Ordinance No. 2000-4 reaches "a range of protected speech" and is therefore unconstitutionally overbroad. Obviously, this argument overlooks the important difference between the depiction of a certain sexual activity on film and the live performance of that same activity in front of a group of customers at an adult cabaret. Accordingly, Jameson's overbreadth argument is plainly without merit.

With respect to Jameson's vagueness claim, he asserts that Section VII(d), which prohibits physical contact between patrons and exotic dancers, does "not clearly draw[ ]" the line between prohibited and acceptable conduct. Specifically, he contends that it could be interpreted to prohibit "social niceties, such as a handshake." We disagree.

A law is impermissibly vague if it is worded in such a way that a person of ordinary intelligence cannot reasonably discern what activity is prohibited.[45] Section VII(d) states in full that "[n]o entertainer or employee shall be permitted to have any physical contact with any patron during any performance." Hence, Section VII(d) only prohibits physical contact between patrons and dancers while the dancer is engaged in an exotic performance. Accordingly, since Section VII(d) clearly defines the prohibited activity, it is not void for vagueness.

Finally, Jameson argues that Section VI of the ordinance, which requires a sexually-oriented business to submit to inspection by county officials "at any time it is occupied or open for business" violates the Fourth Amendment to the United States Constitution. We disagree.

Although the Fourth Amendment's warrant requirement applies to administrative searches and extends to protect commercial businesses,[46] the Supreme Court of the United States recognized an exception for so-called

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[45] *Grayned v. City of Rockford,* 408 U.S. 104, 108, 92 S.Ct. 2294, 2298-99, 33 L.Ed.2d 222 (1972) (stating that "[i]t is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined," and that persons of ordinary intelligence must have a reasonable opportunity to know what is prohibited).

[46] *See Donovan v. Dewey,* 452 U.S. 594, 598, 101 S.Ct. 2534, 2537-38, 69 L.Ed.2d 262 (1981) (stating that "[o]ur prior cases have established that the Fourth Amendment's prohibition against unreasonable searches applies to administrative inspections of private commercial property").

"closely-regulated" industries in *New York v. Burger.*[47] The Supreme Court stated that a statute or ordinance granting government officials the discretion to inspect such a business without a warrant must, *inter alia,* be " 'carefully limited in time, place, and scope' " [citations omitted].[48]

We first note that the issue of whether sexually-oriented businesses as defined by Ordinance No. 2000-4 fell within the definition of a "closely-regulated" industry was not a contested issue below or on this current appeal.[49] Indeed, in his brief to this Court, Jameson has apparently conceded that Regina's II fits within the definition of a "closely-regulated" business as defined by *Burger.* Thus, without deciding whether Jameson's concession is

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[47] 482 U.S. 691, 702-03, 107 S.Ct. 2636, 2644, 96 L.Ed.2d 601 (1987).

[48] *Id.* 482 U.S. at 703.

[49] Our research indicates that this issue is one which is open for debate. *See FW/PBS, Inc. v. City of Dallas,* 837 F.2d 1298, 1306 (5th Cir. 1988) (vacated in part on other grounds 493 U.S. 215, 110 S.Ct. 596, 107 L.Ed.2d 603 (1990) (upholding portion of a zoning regulation requiring sexually-oriented businesses to submit to inspections whenever the premises were occupied or open for business and stating that the regulation permitted "reasonable" searches of "pervasively regulated business[es]"); and *Alexis, Inc. v. Pinellas County, Florida,* 194 F.Supp.2d 1336, 1350 n.15 (M.D. Fla. 2002) (referencing a previous order of the Court finding that the sexually-oriented business at issue fell within the definition of a "highly regulated" business as contemplated by *Burger*). *But see J.L. Spoons, Inc.. v. City of Brunswick,* 49 F.Supp.2d 1032, 1040 (N.D. Ohio 1999) (finding that "because sexually oriented businesses enjoy a degree of First Amendment protection," they "do not qualify as highly regulated industries"); and *Pentco, Inc. v. Moody,* 474 F.Supp. 1001, 1009 (S.D. Ohio 1978) (determining, prior to *Burger,* that the regulation of massage parlors was not " 'deeply rooted' in government control as the Supreme Court found with respect to firearms in *United States v. Biswell,* 406 U.S. 311, 315, 92 S.Ct. 1593, 32 L.Ed.2d 87 (1972)").

warranted, we proceed with our analysis according to the issue as framed by the parties on appeal.

In *Kentucky Restaurant Concepts, Inc. v. City of Louisville, Jefferson County, Kentucky,*[50] the United States District Court for the Western District of Kentucky recently invalidated a somewhat similar regulation on grounds that the provision governing administrative inspections had "no [] limitation upon the time of the searches." The Court went on to state that adding the phrase "reasonable times" would correct the ordinance's Fourth Amendment defect with respect to the time element.[51] In the instant case, Section VI expressly limits the time for administrative inspections to those occasions when the business is either occupied or open for business. Accordingly, unlike the regulation at issue in *Kentucky Restaurant Concepts,* since Section VI "carefully limits" the time for conducting administrative inspections, we conclude that Jameson's Fourth Amendment claim is without merit.

Based on the foregoing, the order of the McCracken District Court is affirmed in part, vacated in part, and this matter is remanded for further proceedings consistent with this Opinion.

ALL CONCUR.

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[50] 209 F.Supp.2d 672, 691 (W.D. Ky. 2002).

[51] *Id.* Similar to the case at bar, whether sexually-oriented businesses fell within the definition of a "closely-regulated" industry as contemplated by *Burger* does not appear to have been a contested issue in *Kentucky Restaurant Concepts.*

BRIEFS AND ORAL ARGUMENT FOR APPELLANT:

Emily Ward Roark
Paducah, Kentucky

BRIEF FOR APPELLEE:

Daniel Y. Boaz
McCracken County Attorney

Christopher Shea Nickell
Asst. County Attorney
Paducah, Kentucky

ORAL ARGUMENT FOR APPELLEE:

Christopher Shea Nickell
Asst. County Attorney
Paducah, Kentucky

COMMONWEALTH OF KENTUCKY
MCCRACKEN CIRCUIT COURT
Division No. I
Case No. 02-XX-004

EDWARD GREEN JAMESON **APPELLANT**

VS. **ORDER AFFIRMING THE McCRACKEN DISTRICT COURT**

(Entered April 10, 2003)

COMMONWEALTH OF KENTUCKY **APPELLEE**

This matter is before the Court on an appeal of a McCracken District Court order denying plaintiff/appellant's motion to declare McCracken County Ordinance No. 2000-4 unconstitutional.

Counsel for Appellant argues that the Ordinance is not based on secondary effects but rather created to regulate the content of sexual oriented businesses, and therefore requires a higher standard of scrutiny. Also, Appellant asserts that the Kentucky Constitution provides greater protection than federal law from arbitrary and discriminatory legislation further invalidating the constitutionality of the Ordinance under Kentucky law. In addition, Appellant states that Ordinance is vague and overbroad and thus is in violation of Kentucky and Federal Constitutions. Finally, the Appellant argues that Section VII of the Ordinance, which permits county officers to inspect their premises at any time they are "occupied or open for business' deprives Appellant's fourth amendment right to be free from unreasonable search and seizures.

Appellee argues, through counsel, that the Ordinance is content neutral and constitutional under the secondary effects doctrine of rational basis scrutiny. In addition,

appellee states that the Ordinance is not arbitrary or discriminatory under equal protection provision of the federal or Kentucky Constitutions. Furthermore, the Ordinance is not vague or overbroad legislation under the Kentucky Constitution. Finally, the Appellee asserts that the Ordinance does not violate the constitutional right to be free from unreasonable search and seizure.

FINDINGS OF FACT

1. The purpose of the Ordinance is to regulate sexually oriented businesses in order to promote the health, safety, and general welfare of the citizens of McCracken county.

2. The District Court found that "McCracken County was entitled to rely on studies from other areas of the country as the rational basis for McCracken County Ordinance NO. 2000-4."

3. Appellant could not cite any case law to the Trial Judge establishing any greater protection is provided to them under the Kentucky Constitution.

4. The District Court was sufficiently advised as to the other matters.

CONCLUSIONS OF LAW

1. Under the secondary effects doctrine, if an Ordinance is enacted to control secondary effects of adult entertainment, and not the actual expressive conduct itself, it is subjected to the rational basis test.

2. Strict Scrutiny does not apply because the Ordinance is content neutral.

3. The District Judge found that the Ordinance satisfied rational basis scrutiny because the purpose of the statute is rationally related to the achievement of a legitimate purpose.

4. The municipality need not conduct new studies or produce evidence independent of that already generated by other municipalities to demonstrate the problem of secondary effects, so long as whatever evidence the municipality relies upon is reasonably believed to be relevant to the problem that the municipality addresses.

5. An Ordinance is not arbitrary nor discriminatory in light of the Federal and Kentucky Constitutions, when it distinguishes sexually oriented businesses from other nightclubs or businesses because of the unique problems involved in adult entertainment activities.

6. A law is vague if a person of ordinary intelligence cannot reasonably interpret what is prohibited, it should be voided.

7. A law is overbroad if, in its reach, it prohibits constitutionally protected conduct. However, in a facial challenge for overbreadth, the Ordinance will be upheld if it be readily susceptible to a narrowing construction that would make it constituional.

8. An exception to the Fourth Amendment's warrant requirement exists when the search is of a 'closely regulated' industry, such as sexually oriented businesses. However, the warrantless searches must be carefully limited in time, place, and scope.

IT IS THEREFORE ORDERED that the judgment of the McCracken District Court is AFFIRMED.

This is a final and appealable order, there being no just cause for delay

ENTERED this 9 day of April, 2003.

/s/ R. Jeffrey Hines
R. JEFFREY HINES, JUDGE
McCRACKEN CIRCUIT COURT
DIVISION NO. I

CLERK'S CERTIFICATE

It is hereby certified that a copy of the foregoing Order was mailed to the following on this 10 Day of April, 2003

Hon. Bard Brian, Judge
Hon. Danny B. Grazine, County Judge Executive

Hon. Tim Kaltenback, Commonwealth Attorney
Hon. Mark P. Bryant & Hon. Emily Ward Roark, Bryant, Kautz, & Osborne,

MIKE LAWRENCE, CLERK
McCracken Circuit Court

BY: /s/ Karen Conoley D.C.

COMMONWEALTH OF KENTUCKY
MCCRACKEN DISTRICT COURT
CASE NO. 00-M-01796

COMMONWEALTH OF KENTUCKY PLAINTIFF

VS. **AGREED ORDER TO ENTER CONDITIONAL GUILTY PLEA**

EDWARD GREEN JAMESON DEFENDANT

The Court having accepted the entry of a Conditional Plea reserving the right to challenge the constitutionality of McCracken County Ordinance 2000-4 and Defendant having entered a Conditional Plea, and the County Attorney having agreed and the Court being sufficiently advised and having agreed that the Defendant may enter a Conditional Plea, reserving his right to appeal the Court's findings and ruling entered by this Court on May 31, 2002 denying the Defendant's motion to declare the McCracken County Ordinance unconstitutional under the State and Federal Constitutions:

IT IS ORDERED that the Defendant may enter a Conditional Plea reserving his right to challenge the constitutionality of McCracken County Ordinance 2000-4.

DATED this the 2 day of July, 2002.

/s/ Bard Brian
Bard Brian, Judge
McCracken District Court

McCRACKEN DISTRICT COURT
CASE NOS. 00-M-01796 & 00-M-01797

COMMONWEALTH OF KENTUCKY PLAINTIFF

VS. ORDER DENYING MOTION TO DECLARE McCRACKEN COUNTY ORDINANCE NO. 2000-4 UNCONSTITUTIONAL AND TO DISMISS THE CRIMINAL COMPLAINTS

(Entered May 31, 2002)

EDWARD JAMESON
JOANNE WARNER DEFENDANTS

This matter having come before the Court on Defendant's motions to declare McCracken County Ordinance No. 2000-4 unconstitutional and dismiss these criminal charges, the Court having conducted several evidentiary hearings and heard the arguments of counsel, this Court having found that under *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986) and *Restaurant Ventures, LLC, d/b/a The Clubhouse v. Lexington-Fayette Urban County Government*, Ky.App., 60 S.W.3d 572 (2001), McCracken County was entitled to rely on studies from other areas of the country as the rational basis for McCracken County Ordinance No. 2000-4, the Defendants having cited no case law establishing any greater protection is provided to them under the Kentucky Constitution and the Court being otherwise sufficiently advised,

IT IS HEREBY ORDERED AND ADJUDGED that Defendant's motions to declare McCracken County Ordinance 2000-4 unconstitutional and dismiss the criminal complaints are hereby denied.

IT IS FURTHER ORDERED AND ADJUDGED that these cases shall be set for a continued first appearance on June 11, 2002 at 9:00 a.m.

ENTERED this the 31st day of May, 2002.

/s/ Bard K. Brian
BARD K. BRIAN
McCRACKEN DISTRICT JUDGE

CLERK'S CERTIFICATE

I hereby certify that true and correct copies of the foregoing have been mailed, first class postage pre-paid, to Hon. Doug McCann, Assistant County Attorney, 301 South Sixth Street, Paducah, Ky 42003 and Hon. Emily Ward Roard, Bryant & Kautz, P.S.C., P.O. Box 1876, Paducah, KY 42002-1876 on this the 31st day of May, 2002.

/s/ [Illegible]
District Clerk

Supreme Court of Kentucky

2004-SC-000983-DG

COMMONWEALTH OF KENTUCKY APPELLANT

ON REVIEW FROM COURT OF APPEALS
V. NO. 2003-CA-000967-DG
MCCRACKEN CIRCUIT COURT, NO. 02-XX-00004

EDWARD GREEN JAMESON APPELLEE

ORDER DENYING PETITION FOR REHEARING

Appellant's motion for leave to file supplemental authorities in the above-styled action is denied.

The petition for rehearing filed by the Appellee, Edward Green Jameson, is hereby denied.

All concur.

Entered: March 22, 2007.

/s/ Joseph E. Lambert
CHIEF JUSTICE

THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. CONST. amend. I.

THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an

executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

U.S. CONST. amend. XIV.

MCCRACKEN COUNTY

ORDINANCE NO. 2000-4

AN ORDINANCE PROVIDING REGULATION OF SEXUALLY ORIENTED BUSINESSES AND THEIR EMPLOYEES

BE IT ORDAINED BY THE COUNTY OF McCRACKEN, KENTUCKY:

WHEREAS, this ordinance will repeal and replace McCracken County Ordinances 99-1, 99-1.1, and 99-1.2; and

WHEREAS, the Fiscal Court of the County of McCracken is concerned about the secondary effects and impacts of sexually oriented businesses such as adult amusement arcades, adult book stores, adult cabarets, adult motels, adult motion picture theaters, adult stage theaters, commercial sexual entertainment centers and escort agencies; and

WHEREAS, sexually oriented businesses require special supervision in order to protect and preserve the health, safety and welfare of the patrons of such businesses as well as the citizens of the County; and

WHEREAS, the concern over sexually transmitted diseases is a legitimate health concern of the County which demands regular regulation of sexually oriented businesses in order to protect the health and well-being of the citizens; and

WHEREAS, there is convincing documented evidence that sexually oriented businesses, because of their very nature, have a deleterious effect on both the existing businesses around them and the surrounding residential

areas adjacent to them, causing increased crime and the down-grading of property values; and

WHEREAS, the Fiscal Court desires to minimize and control these adverse effects and thereby protect the health, safety and welfare of the citizenry; protect the citizens from increased crime; preserve the quality of life; preserve the property values and character of surrounding neighborhoods; and

WHEREAS, it is not the intent of this ordinance to suppress any speech activities protected by the First Amendment, but to enact a content neutral ordinance which addresses the secondary effects of sexually oriented businesses; and

WHEREAS, it is not the intent of the Fiscal Court to condone or legitimize the distribution of obscene material, and the Fiscal Court recognizes that state and federal law prohibits the distribution of obscene materials and expects and encourages state law enforcement officials to enforce state obscenity statutes against any such illegal activities in the County.

SECTION I. PURPOSE AND FINDINGS

I(a). Purpose. It is the purpose of this ordinance to regulate sexually oriented businesses in order to promote the health, safety, and general welfare of the citizens of the County, and to establish reasonable and uniform regulations relating to sexually oriented businesses. The provisions of this ordinance have neither the purpose nor effect of imposing a limitation or restriction on the content of any communicative materials, including sexually oriented materials. Similarly, it is not the intent nor effect

of this ordinance to restrict or deny access by adults to sexually oriented materials protected by the First Amendment, or to deny access by the distributors and exhibitors of sexually oriented entertainment to their intended market. Neither is it the intent nor effect of this ordinance to condone or legitimize the distribution of obscene material.

I(b). Findings. Based on evidence concerning the adverse secondary effects of adult uses on the community presented in reports made available to the Fiscal Court, and on findings incorporated in the cases of *City of Renton v. Play Time Theaters, Inc.*, 475 U.S. 41 (1986), *Young vs. American Mini Theaters*, 426 U.S. 50 (1976), and *Barnes v. Glen Theater, Inc.*, 501 U.S. 560 (1991), and on studies in other communities including but not limited to, Phoenix, Arizona; Minneapolis, Minnesota; Houston, Texas; Indianapolis, Indiana; Amarillo, Texas; Garden Grove, California; Los Angeles, California; Whittier, California; Austin, Texas; Seattle, Washington; Oklahoma City, Oklahoma; Cleveland, Ohio; and Beaumont, Texas; and also on findings from the report of the Attorney General's Working Group on the regulation of sexually oriented businesses, (June 6, 1989, State of Minnesota), the Fiscal Court finds:

1. Sexually oriented businesses lend themselves to ancillary unlawful and unhealthy activities that are presently uncontrolled by the operators of the establishments. Further, there is presently no mechanism to make the owners of these establishments responsible for the activities that occur on their premises.

2. Certain employees of sexually oriented business defined in this ordinance as adult theaters and cabarets

engage in higher incidents of certain types of illicit sexual behavior than employees of other establishments.

3. Sexual acts, including masturbation, and oral and anal sex, occur at sexually oriented businesses, especially those which provide private or semi-private booths or cubicals for viewing films, videos or live sex shows.

4. Offering and providing such space encourages such activities which creates unhealthy conditions.

5. Persons frequent certain adult theaters, adult arcades and other sexually oriented businesses for the purpose of engaging in sex within the premises of such sexually oriented businesses.

6. At least fifty (50) communicable diseases may be spread by activities occurring in sexually oriented businesses, including but not limited to, syphilis, gonorrhea, human immunodeficiency virus infection (HIV-AIDS), genital herpes, hepatitis B, non-A, non-B amebiasis, salmonella infections, and shigella infections.

7. Since 1981 and to the present, there has been an increasing cumulative number of reported cases of AIDS caused by the human immunodeficiency virus (HIV) in the United States. Through December 31, 1997, there have been 619,690 reported cases of AIDS in the United States.

8. As of December 31, 1997, there have been 2,583 reported cases of AIDS in the Commonwealth of Kentucky.

9. The Surgeon General of the United States in his report of October 22, 1986, has advised the American public that AIDS and HIV infection may be transmitted through sexual contact, intravenous drug abuse, exposure

to infected blood and blood components, and from an infected mother to her newborn.

10. According to the best scientific evidence, AIDS and HIV infection, as well as syphilis and gonorrhea, are principally transmitted by sexual acts.

11. Sanitary conditions in some sexually oriented businesses are unhealthy, in part, because the activities conducted there are unhealthy, and, in part, because of the unregulated nature of the activities and the failure of the owners and operators of the facilities to self-regulate those activities and maintain those facilities.

12. Numerous studies and reports have determined that semen is found in the areas of sexually oriented businesses where persons view adult oriented films.

13. The findings noted in paragraphs 1 through 12 raise substantial governmental concerns.

14. Sexually oriented businesses have operational characteristics which should be reasonably regulated in order to protect those substantial governmental concerns.

15. Removal of doors on adult booths and requiring sufficient lighting on premises with adult booths advances a substantial governmental interest in curbing the illegal and unsanitary sexual activity occurring in adult theaters.

16. The general welfare, health and safety of the citizens of the County will be promoted by the enactment of this ordinance.

SECTION II. DEFINITIONS

II. For purposes of this ordinance, certain terms and words are defined as follows, unless the context clearly indicates or requires a different meaning:

1. "Adult Amusement Arcade" means any place to which the public is permitted or invited wherein coin operated, slug operated, or for any form of consideration, electronically, electrically, or mechanically controlled still or motion picture machines, projectors, video or laser disk players, or other image producing devices are maintained to show images to five or fewer persons per machine at any one time, and where the images so displayed are distinguished or characterized by the depicting or describing of "specified sexual activities" or "specified anatomical areas".

2. "Adult Book Store", "Adult Novelty Store", or "Adult Video Store", means a commercial establishment which, as one of its principal purposes, offers for sale or rental for any form of consideration any one or more of the following:

(a) Books, magazines, periodicals or other printed matter, or photographs, films, motion pictures, video cassettes or video reproductions, slides, or other visual representations which are characterized by the depiction or description of "specified sexual activities" or "specified anatomical areas"; or

(b) Instruments, devices, or paraphernalia which are designed for use in connection with "specified sexual activities".

A commercial establishment may have other principal business purposes that do not involve the offering for sale or rental of material depicting or describing "specified sexual activities" or "specified anatomical areas" and still be characterized as "Adult Book Store", "Adult Novelty Store", or "Adult Video Store". Such other business purposes will not serve to exempt such commercial establishments from being categorized as an "Adult Book Store", "Adult Novelty Store", or "Adult Video Store" so long as one of its principal business purposes is the offering for sale or rental for consideration the specified materials which are characterized by the depiction or description of "specified sexual activities" or "specified anatomical areas".

3. "Adult Cabaret" means a night club, bar, restaurant, or similar commercial establishment which regularly features:

(a) Persons who appear in a state of nudity or semi-nude; or

(b) Live performance which are characterized by the exposure of "specified anatomical areas" or by "specified sexual activities"; or

(c) Films, motion pictures, video cassettes, slides or other photographic reproductions which are characterized by the depiction or description of "specified sexual activities" or "specified anatomical areas".

4. "Adult Motel" means a hotel, motel, or similar commercial establishment which:

(a) Offers accommodations to the public for any form of consideration; provides patrons with closed-circuit television transmissions, films, motion pictures, video

cassettes, slides, or other photographic reproductions which are characterized by the depiction or description of "specified sexual activities" or "specified anatomical areas"; and has a sign visible from the public right-of-way which advertises the availability of this adult-type photographic reproductions; or

(b) Offers a sleeping room for rent for a period of time that is less than ten (10) hours; or

(c) Allows a tenant or occupant of a sleeping room to subrent the room for a period of time that is less than ten (10) hours.

5. "Adult Motion Theater" means a commercial establishment where, for any form of consideration, films, motion pictures, video cassettes, slides, or similar photographic reproductions are regularly shown which are characterized by the dominant depiction or description of "specified sexual activities" or "specified anatomical areas".

6. "Adult Stage Show Theater" means a theater, concert hall, auditorium, or similar commercial establishment which regularly features persons who appear in a state of nudity or semi-nude, or live performances which are characterized by the exposure of "specified anatomical areas" or by "specified sexual activities".

7. "County" shall mean the County of McCracken, Kentucky.

8. "Employee" shall mean any person who performs any service on the premises of a sexually oriented business on a full time, part time, or contract basis, whether or not the person is denominated an employee, independent contractor, agent or otherwise and whether or not said

person is paid a salary, wage or other compensation by the operator of said business. "Employee" does not include a person exclusively on the premises for repair or maintenance of the premises or equipment on the premises, or for the delivery of goods on the premises.

10. "Entertainer" means any person who provides sexually oriented entertainment in a sexually oriented business whether or not an employee of the business and whether or not a fee is charged or accepted for such entertainment.

11. "Escort" means a person who, for consideration, agrees or offers to act as a companion, guide, or date for another person, or who agrees or offers to privately model lingerie or to privately perform a striptease for another person.

12. "Escort Agency" means a person or business association who furnishes, offers to furnish, or advertises to furnish escorts as one of its primary business purposes for a fee, tip, or other consideration.

13. "Establishment" means any sexually oriented business, whether existing or opening of such business; the conversion of an existing business, whether or not a sexually oriented business to any sexually oriented business; the additions of any sexually oriented businesses to any other sexually oriented business; or the relocation of any sexually oriented business.

14. "Manager" means any person who manages, directs, administers, or is in charge of the affairs and/or the conduct of a sexually oriented business.

15. "Nude", "Nudity" or a "state of nudity" means the showing of the human male or female genitals, pubic area,

vulva, anus, anal cleft or cleavage with less than a fully opaque covering, the showing of the female breast with less than a fully opaque covering of any part of the nipple, or the showing of the covered male genitals in a discernably turgid state.

16. "Person" means an individual, proprietorship, partnership, corporation, association, or other legal entity.

17. "Semi-nude" or in a "semi-nude condition" means the showing of the female breast below a horizontal line across the top of the areolae at its highest point or the showing of the male or female buttocks. This definition shall include the entire lower portion of the human female breast, but shall not include any portion of the cleavage of the human female breast, exhibited by a dress, blouse, skirt, leotard, bathing suit, or other wearing apparel provided the areolae is not exposed in whole or in part.

18. "Sexual Activities" shall mean depiction of human genitals in a state of sexual stimulation, active human masturbation, sexual intercourse or sodomy, holding or erotic touching of human genitals, pubic regions, buttocks or breasts.

19. "Sexual Encounter Center" means a business or commercial enterprise that, as one of its principal business purposes, offers for any form of consideration:

(a) Physical contact in the form of wrestling or tumbling between persons of the opposite sex; or

(b) Activities between male and female persons and/or persons of the same sex when one or more of the persons is in a state of nudity or semi-nude.

20. "Sexually Oriented Business" means an adult amusement arcade, adult book store, adult novelty store, adult video store, adult cabaret, adult motel, adult motion picture theater, adult stage theater, escort agency, or sexual encounter center.

21. "Specified Anatomical Areas" means:

(a) The human male genitals in a discernibly turgid state, even if completely and opaquely covered; or

(b) Less than completely and opaquely covered human genitals, pubic region, buttocks, or a female breast below a point immediately above the top of the areola.

22. "Specified Sexual Activities" means any of the following:

(a) The fondling or other erotic touching of human genitals, pubic region, buttocks, anus, or female breast;

(b) Sex acts, normal or perverted, actual or simulated, including intercourse, oral copulation, masturbation, or sodomy; or

(c) Excretory functions as part of or in connection with any of the activities set forth in (a) through (b) above.

SECTION III. CLASSIFICATION

III. Sexually Oriented Businesses are classified as follows:

(a) Adult amusement arcades;

(b) Adult book stores, adult novelty stores, or adult video stores;

(c) Adult cabarets;

(d) Adult motels;

(e) Adult motion picture theaters;

(f) Adult stage theaters;

(g) Escort agencies; and

(h) Sexual encounter centers;

SECTION IV. GENERAL RESTRICTIONS, REQUIREMENTS AND CONDITIONS FOR SEXUALLY ORIENTED BUSINESSES

IV. All sexually oriented businesses classified under Section III of this ordinance shall comply with the following requirements:

(a) An establishment shall not exhibit any lettering, wording. pictorial or representational matter which is distinguished or characterized by a depiction of sexual activities on any sign subject to public view from outside the establishment.

(b) An establishment shall not display its stock in trade, inventory, or merchandise which depicts, describes or relates to sexual activities in such a manner as to be subject to public view from outside the establishment.

(c) Except as otherwise provided by laws which may be more restrictive, no owner or operator of an establishment

shall knowingly permit a person under eighteen (18) years of age to be employed by or enter the establishment.

(d) An establishment must have an employee on duty at all times in which the business is open and must be positioned at a station in the premises which is located in such a manner that the entrance can be monitored at all times. Any person who reasonably appears to be under the age of eighteen (18) shall be requested to verify his/her age. All persons under the age of eighteen (18) discovered in the establishment shall be immediately escorted out of the premises.

(e) No establishment, except for an adult motel, shall remain open at any time between the hours of one o'clock (1:00) a.m. and six o'clock (6:00) a.m.

(f) No act of sexual intercourse, sodomy, oral copulation, masturbation, or sexual contact shall be permitted in or on the licensed premises of any sexually oriented business, except an adult motel. No owner, operator, licensee, or employee of a sexually oriented business shall knowingly permit these activities to occur on the licensed premises.

SECTION V. REGULATIONS PERTAINING TO EXHIBITION OF SEXUALLY EXPLICIT FILMS, VIDEOS OR LIVE ENTERTAINMENT IN VIEWING ROOMS.

V.(a). A person who operates or causes to be operated a sexually oriented business, other than an adult motel, which exhibits on the premises in a viewing room of less than one hundred fifty (150) square feet of floor space, a film, video cassette, live entertainment, or other video reproduction which depicts "specified sexual activities" or

"specified anatomical areas", shall comply with the following requirements:

1. Any wall or partition which is situated so as to create a viewing area in which any amusement device or viewing screen is located shall be constructed of not less than one hour fire-restrictive material and shall contain no hole or other perforation.

2. The interior of the premises shall be configured in such a manner that there shall be an unobstructed view from a manager's or cashier's station of every area of the premises to which any patron is permitted access for any purpose excluding restrooms. The view required in this section must be by direct line of sight from the manager's or cashier's station.

3. No viewing room or booth shall be obstructed by any doors, curtains, partitions, walls, merchandise, display racks or other materials. No patron shall be permitted access to any area of the premises which has been designated as an area to which patrons are not permitted.

4. No viewing room or booth shall be occupied by more than one person at any time. No owner, operator, or employee shall knowingly permit any viewing room or booth to be occupied by more than one person at any time.

5. No restroom shall contain any video reproduction devices or equipment.

6. The premises shall be equipped with overhead lighting fixtures of sufficient intensity to illuminate every place to which patrons are permitted access at an illumination of not less than ten (10) foot candles as measured at floor level.

7. It shall be the duty of the owner, operator or employee to ensure that the illumination described above is maintained at all times that any patron or customer is present in the premises.

8. No owner, operator or employee shall allow openings of any kind to exist between viewing rooms or booths.

9. No person shall make or attempt to make an opening of any kind between viewing booths or rooms.

10. The owner, operator and/or employees shall, during each business day, cause the walls between the viewing booths to be regularly inspected to determine if any openings or holes exist.

11. All floor coverings in viewing rooms or booths shall be non-porous, easily cleanable surfaces, with no rugs or carpeting.

12. There must be at least one employee on duty and situated at the manager's station at all times that any patron is present inside the premises.

V.(b). All sexually oriented businesses in operation in the County on the effective date of this ordinance shall comply with the configuration requirements of section V(a)(1)(2) within one hundred and twenty (120) days after the effective date of this ordinance.

SECTION VI. INSPECTION

VI. All sexually oriented businesses shall permit representatives of the County, including representatives of the Sheriff's Department, Fire Department, or other County departments or agencies to inspect the premises of

a sexually oriented business for the purpose of ensuring compliance with the law, at any time it is occupied or open for business.

SECTION VII. REGULATIONS PERTAINING TO LIVE PERFORMANCES.

VII(a). All live performances in any sexually oriented business shall be on a designated performance area consisting of a stage or platform at least eighteen (18) inches above the immediate floor level and removed at least six (6) feet from any area in which any patrons are permitted.

VII(b) No person shall appear nude or in a state of nudity while engaged in any live performance on the premises of any sexually oriented business.

VII(c) No person shall appear semi-nude or in a semi-nude condition while engaged in any live performance on the premises of any sexually oriented business except on the stage or platform described in section VII(a).

VII(d) No entertainer or employee shall be permitted to have any physical contact with any patron during any performance.

VII(e) No entertainer or employee shall be visible from any public place outside the premises during any performance.

SECTION VIII. RECORD KEEPING REQUIREMENTS.

VIII. Each sexually oriented business shall maintain and retain for a period of two (2) years beyond the last date of employment, the full name, date of birth, last

known address, date of termination, and social security number of all persons employed by the sexually oriented business.

SECTION X. SEVERABILITY.

X. If any section, subsection, or clause of this ordinance shall be deemed to be unconstitutional or otherwise invalid, the validity of the remaining sections, subsection, and clauses shall not be affected.

SECTION XI. PENALTIES.

XI. Any person who violates any provision of this ordinance shall be guilty of a misdemeanor and subject to a fine of not less than one hundred dollars ($100.00) nor more than five hundred dollars ($500.00), or be imprisoned in the county jail for not more than twelve (12) months or both.

SECTION XII. EFFECTIVE DATE.

XII. This ordinance shall be read on two separate days and will become effective upon publication pursuant to KRS Chapter 424:

/s/ Danny Orazine
DANNY ORAZINE
McCRACKEN COUNTY
JUDGE EXECUTIVE

ATTEST:
/s/ Randy [Illegible]
COUNTY CLERK

First Reading	4/10/00
Advertised	4/14/00
Second Reading & Adoption	4/24/00
Advertised	4/26/00

Supreme Court, U.S.
FILED
AUG 22 2007
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No. 06-1697

In the Supreme Court of the United States

EDWARD GREEN JAMESON,
Petitioner,

v.

COMMONWEALTH OF KENTUCKY,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Kentucky

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Kentucky Supreme Court correctly held that the county government's prohibition on nude conduct in sexually oriented businesses serves a substantial government interest under *United States v. O'Brien*, 391 U.S. 367 (1968), and its progeny.

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COUNTERSTATEMENT OF THE FACTS

In 1991, this Court upheld, over an adult business's challenge, an Indiana statute prohibiting public nudity. *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991). The Court held that nude dancing is expressive conduct only "marginally" within the "outer perimeters" of the First Amendment, and that Indiana's statute prohibiting that conduct is constitutional because it serves a substantial government interest in preventing the negative secondary effects associated with nude dancing. *Id.* at 566 (plurality); *id.* at 582 (Souter, J., concurring in judgment). In 2000, the Court upheld a similar local law, noting that the interests in "combating the harmful secondary effects associated with nude dancing are undeniably important." *City of Erie v. Pap's A.M.*, 529 U.S. 277, 296 (2000).

Four weeks after the Court's decision in *City of Erie*, the McCracken County Fiscal Court (the County's legislative body) published Ordinance No. 2000-4, "An Ordinance Providing Regulation of Sexually Oriented Businesses and Their Employees." App. 95-111. Section VII(b) of the Ordinance, App. 110, like the regulations at issue in *Barnes* and *City of Erie*, requires the *de minimis* covering of "pasties" and a "G-string," *see* App. 103-04 (defining "nudity"), but differs from those regulations in one important respect: it is more narrowly tailored because it applies only to sexually oriented businesses, the category of establishments associated with secondary effects. *Barnes*, 501 U.S. at 584 n.2 (Souter, J., concurring in judgment) (counseling that nudity prohibition should

be limited to "the context of *Renton*-type adult entertainment").

The preamble to the McCracken County Ordinance recognizes the negative secondary effects associated with sexually oriented businesses, and the Ordinance eschews any regulation of the content of speech. App. 96 ("The provisions of this ordinance have neither the purpose nor effect of imposing a limitation or restriction on the content of any communicative materials, including sexually oriented materials."). Rather, the law's purpose is to regulate sexually oriented businesses "in order to promote the health, safety, and general welfare of the citizens of the County, and to establish reasonable and uniform regulations relating to sexually oriented businesses." App. 96.

In adopting the Ordinance, the Fiscal Court relied on extensive legislative evidence documenting the adverse secondary effects of sexually oriented businesses, including reports from: (1) Phoenix, Arizona; (2) Minneapolis, Minnesota; (3) Houston, Texas; (4) Indianapolis, Indiana; (5) Amarillo, Texas; (6) Garden Grove, California; (7) Los Angeles, California; (8) Whittier, California; (9) Austin, Texas; (10) Seattle, Washington; (11) Oklahoma City, Oklahoma; (12) Cleveland, Ohio; (13) Beaumont, Texas; and (14) The Report of the Attorney General's Working Group on the Regulation of Sexually Oriented Businesses (State of Minnesota, June 6, 1989). App. 97.

Moreover, the Fiscal Court relied on the "findings incorporated in the cases of *City of Renton v. Play*

Time Theaters, Inc., 475 U.S. 41 (1986), *Young v. American Mini Theaters*, 426 U.S. 50 (1976), and *Barnes v. Glen Theater, Inc.*, 501 U.S. 560 (1991)." App. 97. In other words, just as the city council in the *Erie* case had done, the McCracken County Fiscal Court "expressly relied on *Barnes* and its discussion of secondary effects, including its reference to *Renton* and *American Mini Theatres*." *City of Erie*, 529 U.S. at 297. Such reliance was specifically countenanced in *City of Erie*:

> Because the nude dancing at Kandyland is of the same character as the adult entertainment at issue in *Renton*, *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 49 L. Ed. 2d 310, 96 S. Ct. 2440 (1976), and *California v. LaRue*, 409 U.S. 109, 34 L. Ed. 2d 342, 93 S. Ct. 390 (1972), it was reasonable for Erie to conclude that such nude dancing was likely to produce the same secondary effects. And Erie could reasonably rely on the evidentiary foundation set forth in *Renton* and *American Mini Theatres* to the effect that secondary effects are caused by the presence of even one adult entertainment establishment in a given neighborhood. See *Renton v. Playtime Theatres, Inc.*, 475 U.S. at 51-52 (indicating that reliance on a judicial opinion that describes the evidentiary basis is sufficient).

Id. at 296-297.

Based on this Court's decisions and relevant secondary effects information, the Fiscal Court adopted 16 individual findings which focus on one

category of secondary effects: illicit sexual behavior on the premises of sexually oriented businesses. App. 97-99. This problem is well-documented in the relevant cases. *See, e.g., Barnes*, 501 U.S. at 584 (citing *United States v. Marren*, 890 F.2d 924, 926 (7th Cir. 1989) ("Michael's Magic Touch served alcoholic beverages and entertained its patrons with nude female dancers who, when not performing on stage, solicited the club's patrons to engage in sexual activities in rooms located above the club"), and *United States v. Doerr*, 886 F.2d 944, 949 (7th Cir. 1989) ("The clubs were nude dancing establishments that served no food or alcoholic beverages. The testimony at trial revealed that the prostitution activities at the clubs were conducted pursuant to the following general procedure . . . .")).

COUNTERSTATEMENT OF PROCEEDINGS BELOW

Shortly after the passage of the Ordinance, Edward Green Jameson received a criminal citation for operating his adult cabaret (Regina's II) in violation of several provisions of the Ordinance. In addition to violating the hours of operation requirement, Jameson allowed total nudity by the dancers and physical contact between nude dancers and customers. App. 3.

Jameson filed a motion in McCracken District Court to declare the Ordinance unconstitutional. An evidentiary hearing was conducted on October 18, 2001. App. 3. While several individuals testified on behalf of Jameson, *none* of the testimony attempted to explain how the pasties and G-string requirement would not be "in furtherance of" the Fiscal Court's interest in preventing the illicit sexual behavior

identified in the Ordinance's findings. App. 5. *See City of Erie*, 529 U.S. at 301 (upholding "pasties and G-string" requirement as narrowly tailored).

The first witness was Brent Stringer, a 911 dispatcher who testified as a lay witness. He discussed only the raw number of calls for police service from certain addresses. App. 3-4. Mr. Stringer noted that 911 had received numerous calls from Regina's II, comprising approximately two and one-half pages from that location, during the calendar year 2001 to that date. App. 3. Thus, Mr. Stringer confirmed that numerous calls for police service had been made from the sexually oriented businesses, albeit fewer than from two large non-adult nightclubs nearby. App. 3. Mr. Stringer did not testify as to the number of patrons, size, or occupancy limits of any establishment. App. 4. Significantly, Mr. Stringer testified that not all criminal investigations are reported on the 911 call log; *e.g.*, the log excludes undercover investigations. App. 50.

The next two witnesses were Melissa Meyer, day shift manager at The Playhouse, and Joanne Warner, owner of The Playhouse and other adult businesses in Colorado, Illinois and Tennessee. Ms. Meyer discussed the "rules" in effect at The Playhouse in order to keep the business and its employees safe. In particular, she noted the rules against drugs, acts "of any sexual nature," prostitution, and requiring that "everything is sanitized." Notwithstanding the violations involved in this case, Ms. Meyer testified that patron-dancer touching was prohibited. Ms. Warner then testified about the establishment's specific rules for dancers, including that "the clients be told we do not condone

any type of sexual masturbation." She also testified that she had called the police to report a man engaging in indecent exposure on the premises. App. 4.

George Wiley, a realtor, gave lay opinion testimony that the value of real estate on the "south side of Paducah" had "increased tremendously" over the past ten to fifteen years based on "what it's selling for now" and "the fact that it wasn't selling" fifteen years before. However, Mr. Wiley admitted that much of the increase in "south side" real estate in general was due to the recent presence of Wal-Mart in the area. App. 5.

On May 31, 2002, the McCracken District Court denied Jameson's motion to declare the Ordinance unconstitutional. App. 5. Applying this Court's decision in *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), the court concluded that McCracken County was entitled to rely upon the studies it compiled concerning the negative secondary effects of sexually oriented businesses. App. 6.

On April 9, 2003, the McCracken Circuit Court affirmed. Following *Renton*, the court held that the County need not "conduct new studies or produce evidence independent of that already generated by other municipalities to demonstrate the problem of secondary effects," but need only rely on evidence reasonably believed to be relevant to the problem. App. 6.

Jameson appealed. On August 6, 2004, the Kentucky Court of Appeals affirmed in part, vacated in part, and remanded the case for further proceedings.

App. 6. The court stated that "as between totally nude exotic dancing and exotic dancing that is accompanied by pasties and G-strings, we hold that any muting of the erotic message that occurs by prohibiting the totally nude exotic dancing is *de minimis*." Notwithstanding the *de minimis* nature of the regulation, and despite this Court's on-point decisions in *Barnes* and *City of Erie*, the panel reversed the lower courts' findings that the pasties and G-string regulation is constitutional. App. 7.

Citing *City of Los Angeles v. Alameda Books,* 535 U.S. 425 (2002), the Court of Appeals held that the witness testimony tended to cast direct doubt on the Fiscal Court's justification for the Ordinance. The Court of Appeals did not explain how the witness testimony demonstrated the Fiscal Court's reliance on relevant decisions, detailed legislative findings, and numerous secondary effects studies to be unreasonable. Nor did the Court of Appeals explain how the witness testimony undermined, in any way, the County's rationale that regulating nude conduct will prevent illicit sexual behavior in sexually oriented businesses. The Court of Appeals nevertheless shifted the burden back to the legislative body and remanded the case for an evidentiary hearing, requiring the county to proffer additional evidence indicating that the Ordinance's "ban on totally nude dancing furthers a substantial government interest *in McCracken County* without unreasonably limiting alternative avenues of communication." App. 8.

The Commonwealth filed a petition for discretionary review in the Kentucky Supreme Court, which was granted. From the outset, the Kentucky

Supreme Court identified the sole issue in the case as whether the Court of Appeals erred as a matter of law in concluding that Jameson provided evidence sufficient to cast direct doubt on the Ordinance's rationale to shift the evidentiary burden back to the legislative body. App. 8. The court then reviewed the history and development of First Amendment jurisprudence as it relates to sexually oriented businesses from *United States v. O'Brien*, 391 U.S. 367 (1968), through *Alameda Books*, 535 U.S. 425 (2002). App. 9-36.

After thoroughly and accurately discerning all the correct governing principles from this Court's jurisprudence, the Kentucky Supreme Court held that the Court of Appeals entirely "failed to articulate how Jameson's evidence successfully cast 'direct doubt' on McCracken County's evidentiary findings, which were based in part on the findings of the various courts in *Renton*, *Young*, and *Barnes*, as well as the County's findings that illicit sexual behavior occurs in sexually oriented businesses." App. 43. Specifically, the Court of Appeals erred by holding that Jameson shifted the burden back to the County by allegedly "demonstrating a lack of secondary effects *in McCracken County*." App. 46. "Not only does *Alameda Books* not support such a conclusion, but the requirement of a finding of local secondary effects essentially changes substantive law regarding the secondary effects evidence necessary to further a substantial government interest. Thus, the Court of Appeals erred in so ruling." App. 46; *see also id.* at 48 (emphasizing "*Renton*'s core principle that local governments are not required to conduct their own studies in order to justify an ordinance designed to

combat the secondary effects of adult businesses. Indeed, requiring a city to conduct its own studies would require that these conditions already exist, obviating the need for any form of burden shifting analysis").

Consistent with this Court's precedents, the Kentucky Supreme Court held that the Ordinance "satisfies the second prong of *O'Brien* in that the ordinance furthers the county's substantial governmental interest in preventing and combating the negative secondary effects associated with sexually oriented businesses." App. 53. Accordingly, the Kentucky Supreme Court reversed the Court of Appeals and reinstated the prior holding of the district court regarding the constitutionality of the Ordinance. App. 54.

REASONS FOR DENYING THE WRIT

A petition for a writ of certiorari will be granted only for compelling reasons, such as when (1) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals, or (2) a state court has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court. A petition is rarely granted when the asserted error consists of the misapplication of a properly stated rule. *See* United States Supreme Court Rule 10.

Jameson's petition fails to establish any compelling reason to grant the writ. Indeed, Jameson fails to identify *any* misstatement of law in the decision below. He argues, instead, that the Court's plurality decisions have engendered confusion in the lower courts—without disclosing that those courts unanimously agree on what constitutes the holding of each of this Court's decisions and that the lower courts are quite consistent in the results that they reach. Contrary to Jameson's suggestion, the opinion below does not conflict with governing Eleventh Circuit precedent because that court's most recent ruling on the topic harmonizes its earlier rulings with those of this Court and the other courts of appeal. Finally, while Jameson alleges circuit splits on other topics within the area of regulation of sexually oriented businesses, neither the facts nor opinion in this case give rise to those questions or present a proper vehicle for this Court to address them. For all these reasons, this Court should deny the petition for a writ of certiorari.

I. THIS COURT'S JURISPRUDENCE CONCERNING THE REGULATION OF SEXUALLY ORIENTED BUSINESSES HAS NOT ENGENDERED SIGNIFICANT CONFUSION AMONG LOWER COURTS.

Jameson's primary argument supporting his petition for writ of certiorari is that "the highly-fractured nature of this Court's plurality opinions regarding the 'secondary effects' doctrine has led to significant confusion in the lower courts." App. 11. Although several of this Court's decisions in this area

of law are indeed plurality opinions, the resulting jurisprudence is clear and consistent.

In *United States v. O'Brien*, 391 U.S. 367 (1968), this Court set forth the standard for evaluating restrictions on expressive conduct under the First Amendment:

> [A] government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

391 U.S. at 377.

The Court applied this standard in the adult business context in *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986). There, the Court considered a time, place, and manner regulation that required adult theaters to locate more than 1,000 feet from residential zones, dwellings, churches, parks, and schools. *Id.* at 46. The Court stated that "content-neutral" speech regulations—those that are justified without reference to the content of the regulated speech—"are acceptable so long as they are designed to serve a substantial governmental interest and do not unreasonably limit alternative avenues of communication." *Id.* at 47-48.

With regard to whether the ordinance served a substantial governmental interest, the Court held that Renton was entitled to rely on the experiences of other cities and the findings summarized in judicial decisions about the secondary effects associated with sexually oriented businesses. *Id.* at 51-52. The Court stated the city was not required to rely on local studies, nor was it required to conduct new studies or to produce evidence independent from that produced by other cities. *Id.* Under *Renton*, a regulation satisfies the First Amendment "so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses." *Id.*

Five years later, in *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991), the Court applied *O'Brien* analysis to a state statute prohibiting public nudity when it was challenged on First Amendment grounds by establishments that desired to provide totally nude dancing. 501 U.S. at 567 (plurality opinion); *id.* at 582 (Souter, J., concurring). Despite the lack of *any* legislative history or record evidence concerning secondary effects, the nudity ban in *Barnes* was upheld because it served a current governmental interest in preventing the negative secondary effects associated with nude dancing. *Id.* at 582-83 (Souter, J., concurring).

Relying on *Renton*, the controlling opinion in *Barnes* concluded that live nude dancing would likely produce the same negative secondary effects as the type of entertainment at issue in previous Court decisions (*i.e.*, *Renton*, *American Mini Theatres*, *LaRue*), and that the statute therefore served a substantial government interest in preventing such

adverse effects. *Id.* at 584. The opinion agreed with "*Renton*'s recognition that legislation seeking to combat the secondary effects of adult entertainment need not await localized proof of those effects," and it held that regulating adult businesses due to their correlation with secondary effects is unrelated to the suppression of free expression. *Id.* at 584-86.

More recently, in *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000), this Court applied *O'Brien* analysis and the evidentiary standard set forth in *Renton* to conclude that a ban on public nudity, which required erotic dancers to wear pasties and g-strings, furthered the government interest in preventing harmful secondary effects and did not violate the First Amendment. The court approved the city's reliance on previous judicial decisions that described the evidentiary basis for similar regulations. *Id.* at 296-97. It also recognized that the city's own secondary effects findings—unaided by extrinsic evidence—are sufficient in the absence of specific reason to doubt them. *Id.* at 297-98. Finally, the Court rejected the idea that empirical analysis or academic studies are required for establishing a substantial government interest under *O'Brien*, holding that the government has a "freer hand" when regulating conduct. 529 U.S. at 299-300.

Finally, in *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425 (2002), the Court applied *Renton* analysis to a unique zoning regulation prohibiting the combination of adult bookstore and adult arcade operations under one roof. The city contended that such combinations would have the same zoning-type secondary effects as the city had found, in an earlier

study, to be associated with separate sexually oriented businesses clustered in a neighborhood. 535 U.S. at 430-31.

Los Angeles—which relied *solely* on its 1977 zoning study—admitted that it did not study the effects of "any separate-standing adult bookstore or arcade," let alone any "combination" establishments. *Id.* at 436. Although the lower courts granted summary judgment against the city for lack of specific evidence concerning "combination" businesses, this Court reversed, holding that the circuit court erred in "refus[ing] to allow the city to draw the inference that 'the expansion of an adult bookstore to include an adult arcade would increase' business activity and produce the harmful secondary effects" identified in the city's zoning study. *Id.* at 436-37 (quoting 222 F.3d 719, 726 (9th Cir. 2000)). The Court also explained that while a city must provide evidence supporting its own rationale, the city "does not bear the burden of providing evidence that rules out" alternative theories of secondary effects. *Alameda Books*, 535 U.S. at 437 ("The Court of Appeals simply replaced the city's theory . . . with its own . . . .").

Alameda Books clarifies that the latitude given cities to address secondary effects allows reliance on evidence of harm not directly on point with the regulation adopted, but nevertheless supportive of an inference justifying the regulation. It was in this context of relying on an inference that the plurality introduced a burden-shifting procedure—not to "appraise the wisdom of the City's decision," *Renton*, 475 U.S. at 52, but only to ensure that "the municipality meets the [reasonably believed to be

relevant] standard set forth in *Renton*." *Alameda Books*, 535 U.S. at 438-39.

Justice Kennedy's concurrence stressed that a city cannot advance a content-based rationale, *i.e.*, that the city will reduce secondary effects because its regulation will force the closure of one or more adult businesses. *Id.* at 450-51. Rather, a city must "advance some basis to show that its regulation has the purpose and effect of suppressing secondary effects, while leaving the quantity and accessibility of speech substantially intact." *Id.* at 449. This is the "proposition [that] a city need[s] to advance in order to sustain a secondary-effects ordinance." *Id.*

Justice Kennedy agreed with the plurality that the city's inference, drawn from its zoning study, was reasonable. *Id.* at 450-52. He emphasized that cities need only rely on some evidence "reasonably believed to be relevant" when reaching legislative judgments concerning secondary effects, acknowledging that city councils are in a better position than the courts to make policy decisions affecting their municipalities. *Id.*

The Kentucky Supreme Court faithfully applied these precedents in the opinion below when it ruled, as a matter of law, that the Ordinance served a substantial governmental interest. It properly evaluated all the evidence under the *Alameda Books* framework to ensure that the County relied on evidence "reasonably believed to be relevant" to the secondary effects the Ordinance seeks to address. Consistent with this Court's on-point decisions in *Barnes* and *City of Erie*, the Kentucky Supreme Court

held that the City's extensive legislative record and its rationale of preventing illicit sexual behavior and other secondary effects satisfied the *O'Brien / Renton* standard.

Conspicuously, Jameson does not argue that even one legal principle on which the Kentucky Supreme Court based its decision is contrary to or inconsistent with what Jameson insists is this Court's supposedly fractured and confusing jurisprudence. Jameson's arguments against the ruling below consist of alleged misapplication of a properly stated rule of law and are therefore an inappropriate basis for granting certiorari. *See* United States Supreme Court Rule 10.

Ignoring this fatal defect in his petition, Jameson contends that "a number of courts, including the Kentucky Supreme Court here, have recently devoted entire portions of their opinions just trying to decipher what these split decisions mean." App. 13 (citing cases). This conflates analysis with confusion. In each of the cited opinions, the various courts simply proceed, as required, to discern the holding of a plurality decision of this Court under *Marks v. United States*, 430 U.S. 188 (1977) (explaining that the holding of a plurality decision may be viewed as that position taken by those justices who concur in the judgment on the narrowest grounds.). In each of those cases, the courts perform the same analysis under *Marks* and arrive at the same conclusions as to which of this Court's opinions constitute the official holding of a plurality decision.

Notwithstanding Jameson's claim of confusion, lower courts have carefully followed this Court's

precedents and have reached consistent results regarding regulation of nude conduct in sexually oriented businesses. *See, e.g.*, *SOB, Inc. v. County of Benton*, 317 F.3d 856 (8th Cir. 2003) (rejecting adult business's challenge to nudity regulation); *Daytona Grand, Inc. v. City of Daytona Beach*, 490 F.3d 860 (11th Cir. 2007) (same). Because all the circuit courts concur with the Kentucky Supreme Court's findings as to this Court's holdings in plurality opinions, Jameson's claim of "significant confusion" on this point is demonstrably incorrect. The petition should be denied.

II. THE DECISION BELOW DOES NOT CONFLICT WITH GOVERNING PRECEDENT IN THE ELEVENTH CIRCUIT.

Jameson also argues that "the Kentucky Supreme Court's seeming rejection of the relevance of a lack of localized secondary effects" is in conflict with rulings of the Eleventh Circuit, especially *Peek-A-Boo Lounge of Bradenton, Inc. v. Manatee County*, 337 F.3d 1251 (11th Cir. 2003), which allegedly required "localized empirical studies." App. 17.

As an initial matter, to the extent that *Peek-A-Boo*, one of the first circuit court cases decided after *Alameda Books*, may be read to require a municipality to product local or empirical evidence of negative secondary effects, it is flatly contrary to this Court's precedent. "[L]egislation seeking to combat the secondary effects of adult entertainment need not await localized proof of those effects." *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 584 (Souter, J., concurring

in judgment) (following *Renton*, 475 U.S. 41, 51-52)). "All five Justices in the *Alameda Books* majority affirmed *Renton's* core principle that local governments are not required to conduct their own studies in order to justify an ordinance designed to combat the secondary effects of adult businesses. *See Alameda Books*, 535 U.S. at 438 (plurality opinion); *id.* at 451 (Kennedy, J., concurring)." *World Wide Video of Washington, Inc. v. City of Spokane*, 368 F.3d 1186, 1193 (9th Cir. 2004). Jameson cannot create a split of authority on the back of a circuit court opinion that is so obviously contrary to governing law.

Moreover, the Kentucky Supreme Court distinguished *Peek-A-Boo* and its substantially different factual record. App. 47. Here, Jameson offered no evidence that undermined the negative secondary effects evidence on which the County relied in crafting its Ordinance, nor did Jameson cast any doubt on the County's straightforward rationale that regulating nude conduct in erotic enterprises will further the interest in preventing illicit sex acts in such establishments.

Finally, the most recent decision from the Eleventh Circuit on this topic reconciles any apparent conflict that may have once stemmed from *Peek-A-Boo*. In *Daytona Grand, Inc. v. City of Daytona Beach*, 490 F.3d 860 (11th Cir. 2007), the district court had ruled after a bench trial that the city's evidence supporting its ordinance did not further the substantial government interest in reducing negative secondary effects associated with strip clubs. 490 F.3d at 862. On appeal, the Eleventh Circuit reversed, noting that, under *Alameda Books*, a city need not conduct new

studies or produce evidence independent of that already generated by other cities, so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses." *Id.* at 875 (citation omitted). The court flatly rejected the plaintiff's "claim that either *Alameda Books* or *Peek-A-Boo Lounge* raises the evidentiary bar or requires a city to justify its ordinances with empirical evidence or scientific studies." *Id.* at 880.

Thus, the Eleventh Circuit's position is consistent with that of the Kentucky Supreme Court as well as the other federal courts of appeal, and petition is not well-taken.

III. THE REMAINING POINTS OF LAW ON WHICH JAMESON CONTENDS A CIRCUIT SPLIT EXISTS DO NOT STEM FROM THE RULING BELOW.

Having failed to manufacture a circuit split from rulings the Kentucky Supreme Court *did* make in the case below, Jameson next attempts to manufacture one out of rulings it did *not* make. These efforts fail.

For example, Jameson maintains there is a circuit split on whether "the generally relied upon secondary effects reports examining adult bookstores and live entertainment venues can be used to justify regulations of 'take out' only facilities where there is no viewing of adult entertainment on the premises." App. 15. Here, of course, Jameson received a criminal citation for operating an "adult cabaret," which the Ordinance defines as regularly featuring nude or semi-nude persons in live performances or in films shown on

site. App. 3 n.5. Since Jameson does not operate such a "take out" establishment, this Court could not address any circuit split on that issue through this case.

Similarly, Jameson alleges "a conflict in the circuits concerning whether the secondary effects 'reliance' component of *Renton* can be used to legitimize the extension of regulations so that they apply to a business that presents 'adult' entertainment on only a *single* occasion." App. 15. Jameson's cabaret "regularly" features sexually explicit performances. App. 3 n.5. Therefore, the constitutionality of regulating a single performance is not at issue in this case.

Finally, Jameson alleges a significant split of authority on "when the government needs to rely on its secondary effects materials, and what secondary effects are relevant to a particular restriction upon expression." App. 23. Again, the preamble and findings of the Ordinance demonstrate that the Fiscal Court relied on its secondary effects rationale prior to the adoption of the Ordinance, App. 95-99, and thus the issue of post-enactment reliance was not addressed below. Therefore, this case is not the appropriate vehicle for this Court to address any such perceived differences of authority.

CONCLUSION

The decision below is faithful to this Court's on-point precedents. It presents no novel question of law warranting the granting of Jameson's petition for a writ of certiorari. There is no lower-court conflict

stemming from this case, and Jameson's identification of extraneous (alleged) conflicts does not make this case the proper vehicle for resolution of issues this case does not raise. For the foregoing reasons, the Commonwealth of Kentucky respectfully urges the Court to deny the petition.

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In The
Supreme Court of the United States

EDWARD GREEN JAMESON,

Petitioner,

v.

COMMONWEALTH OF KENTUCKY,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Kentucky

REPLY TO BRIEF IN OPPOSITION

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REPLY TO COUNTERSTATEMENT OF THE FACTS AND PROCEEDINGS

While the Commonwealth describes in detail the "secondary effects" legislative preambles to Ord. 2000-4 (Opp. at 2-4), it does not deny, or even attempt to address, the unmistakable but irrefutable fact pointed out in the petition that *none* of the reviewing courts ever had before them the government's *evidence* that supposedly served as the basis for the enactment of the challenged ordinance. The underlying question in this petition is, after all, whether – under the plurality standards of *City of Los Angeles v. Alameda Books Inc.*, 535 U.S. 425 (2002) – Mr. Jameson's (the criminal defendant below) *unrebutted* witness testimony and documentary submission "cast direct doubt" upon the *evidentiary* record that McCracken County (sometimes the "County") had supposedly compiled as a basis for concluding that the enactment of Ord. 2000-4 was necessary to address a documented concern of adverse secondary effects.

By its silence, the Commonwealth has acknowledged what should be a startling (and, more importantly, constitutionally disconcerting) observation that all of the courts below felt that they could appropriately evaluate whether Mr. Jameson's submission successfully rebutted a governmental evidentiary record *that they never in fact examined.* Four separate courts were asked to determine whether Mr. Jameson's presentation "cast direct doubt" upon the County's claimed governmental interest of addressing adverse secondary effects. Two courts (the McCracken district and circuit courts) declined to specifically address the issue. The Kentucky Court of Appeals concluded that Mr. Jameson's evidence did, indeed, fulfill the criteria set forth in the *Alameda Books* plurality. The State Supreme Court came to exactly the opposite conclusion, finding that

Mr. Jameson's evidence did not meet this standard. Yet, in reaching such diametrically opposite conclusions, none of the courts had before them the *evidence* that the government supposedly relied upon in order to be able to properly evaluate such an evidentiary attack.

If courts believe that they are free to determine whether or not certain evidence has been rebutted, without ever actually having *that evidence* to review, examine and analyze, this demonstrates that further direction from this Court is desperately needed.

The Respondent also claims that the findings set forth in the ordinance preambles "focus on one category of secondary effects: illicit sexual behavior on the premises of sexually oriented businesses." Opp. at 3-4. First, these findings relate to the ordinance provision that require doors to be removed from "peek booths"; a matter irrelevant to the ordinance sections that Mr. Jameson was charged with violating. *See* Petition, at 6 n.6. Second, such findings cannot explain in any regard the justification of the "hours-of-operation" provision that served as part of the basis of Mr. Jameson's prosecution.

Next, the Commonwealth describes Mr. Jameson as operating "his" club (Opp. at 4), although he was only the manager. The Respondent further states that Mr. Jameson violated the ordinance by "allow[ing] total nudity by the dancers and physical contact between nude dancers and customers," (Opp. at 4), without responding to the observation set forth in the Petition (at 2 n.1) that Ord. 2000-4 contains no respondeat superior liability provision and therefore does not place criminal exposure on a club manager for a violation of the ordinance proscriptions by an entertainer.

The Commonwealth then states that the crime data to which dispatcher Brent Stringer testified included "only the raw number of calls for police service from certain addresses." Opp. at 5. However, this is a gross misstatement of Mr. Stringer's testimony. As pointed out in the petition (at 7), the records submitted in the evidentiary hearing included calls where officers were dispatched, activities that were self-reported by police officers, and reports concerning undercover investigations.[1] *See also* Reply App. 22-25.

Additionally, the Commonwealth further attacks Mr. Jameson's evidence by pointing out that "Mr. Stringer did not testify as to the number of patrons, size, or occupancy limits of any establishment." Opp. at 5. However, there is not a single judicial decision that purports to require such information to be evaluated as a requisite to admissibility. Moreover, the "pre-packaged" studies that governments normally rely upon in order to justify the enactment of adult business regulations fail to contain any of the analysis elements that the Commonwealth claims to be methodologically necessary here.

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[1] Consequently, the Commonwealth's assertion that police undercover investigations were *not* included in the police records examined (Opp. at 5, citing the Kentucky Supreme Court's statement to that effect at Pet. App. 50), is blatantly false. Mr. Stringer's *actual testimony* was quite to the *contrary*. *See* Reply App. 24.

CIRCUIT RULINGS ISSUED *AFTER* THE FILING OF THE UNDERLYING PETITION DEMONSTRATE THAT CLARIFICATION BY THIS COURT OF THESE EVIDENTIARY STANDARDS IS NEEDED

In its opposition, the Commonwealth relies heavily upon the recent Eleventh Circuit decision in *Daytona Grand, Inc. v. City of Daytona Beach, Fla.*, 490 F.3d 860 (11th Cir. 2007). Irrespective of the fact that this ruling is at diametric odds with that circuit's earlier rulings in *Flanigan's Enter., Inc. v. Fulton County, Ga.*, 242 F.3d 976 (11th Cir. 2001), *cert. denied*, 536 U.S. 904 (2002), and *Peek-A-Boo Lounge of Bradenton, Inc. v. Manatee County*, 337 F.3d 1251 (11th Cir. 2003), *cert. denied*, 541 U.S. 988 (2004) (*compare* descriptions of those rulings in the Petition, at 16-18),[2] the Respondent, however, inexplicably omits from its memorandum an even more recent circuit ruling[3] that fully demonstrates the conflicts in the lower courts in regard to these unclear evidentiary standards.

Shortly after the release of the *Daytona Grand* opinion, the Tenth Circuit issued its ruling in *Abilene Retail #30, Inc. v. Board of Com'rs of Dickinson County, Kan.*, 492

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[2] A petition for rehearing en banc is currently pending in *Daytona Grand*.

[3] The failure of the Commonwealth to bring this critical appellate decision to the attention of this Court in its Opposition cannot be excused on the basis that the ruling was too new to have been discovered. The attorney for the Commonwealth here is also counsel for the county in the *Abilene Retail* case; he was obviously then aware of the Tenth Circuit opinion; and he had, in fact, filed a motion for en banc review of that decision *before submitting the response in this matter*. *See* Reply App. 1-19. Because of this and the other matters discussed in the following section, the omission of this ruling in the Opposition should be quite disturbing to this Court.

F.3d 1164, 2007 WL 1982130 (10th Cir.), which is basically directly contrary to the Eleventh Circuit's decision (*see also* further discussion in following section below). This conflict is all the more critical because the challenges brought by the adult businesses in the two cases utilized the *exact same secondary effects expert witness*: Dr. Daniel Linz. While the Eleventh Circuit found that his testimony did not "cast direct doubt" upon the secondary effects justification of the municipal ordinance at issue in that proceeding, the Tenth Circuit came to basically the opposite conclusion in regard to the challenged law there.

Abilene Retail includes both a majority opinion *and a three-judge (unanimous) concurrence*. The majority opinion authored by Judge Lucero concluded that Dickinson County had not satisfied its initial evidentiary opinion to justify the enactment of the zoning ordinance in question there. *Id.* at **1 n.1, 6-9.

The concurrence of Judge Ebel, which the other two panel members joined as an alternative basis for their ruling (*see id.*, at *9 n.13), is, however, more telling in regard to the various circuit splits on these issues. The unanimous concurrence concluded that the testimony and evidence submitted by the adult business had, indeed, "cast direct doubt" upon the county's evidence and, therefore, shifted the burden back to the county to attempt to justify the necessity for the challenged zoning regulation. *Id.* at **15-17.

Specifically, the appellate court listed for its conclusion five studies conducted by Dr. Linz finding that adult uses do not cause the types of problems that the county sought to prevent (*id.* at *15), an "academic peer-reviewed

article that he wrote with others[4] challenging the validity of the County's studies" (*id.* at *16), and "[m]ore importantly, perhaps," the fact that Abilene Retail had presented evidence that its store had not, in fact, produced any of the feared adverse secondary effects. *Id.* at *15. But this is *virtually the same evidence that the Eleventh Circuit dismisses in Daytona Grand. See* 490 F.3d at 883-885. *See also Daytona Grand, Inc. v. City of Daytona Beach*, 410 F.Supp.2d 1173, 1179-1188 (M.D. Fla. 2006) (discussing the "local" secondary effects evidence, and Dr. Linz's testimony and supporting materials, submitted at trial).

In addition, the comparison of the *local* evidence that Mr. Jameson and Abilene Retail presented also illustrates the lack of clarity of these evidentiary standards. While the Kentucky Supreme Court chastises Mr. Jameson's reliance upon police records in the form of *calls for service*[5] (Pet. Appx. at 50-51),[6] the Tenth Circuit specifically relies upon such data presented by the county undersheriff in order to conclude that the adult business at issue there did not engender any forms of adverse secondary effects. 2007 WL 1982130, at *1 n.1. *See also id.* at *15 (Ebel J., concurring) (in commenting upon this and other evidence, the three-judge concurrence stated: "More importantly, perhaps, Abilene Retail also presented evidence that its store has in fact not produced any of the negative secondary effects that the County's ordinance was designed to eliminate"). *Accord Flanigan's Enter., Inc.*, 242 F.3d at 979

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[4] The undersigned being one of them.

[5] However, as pointed out above, the records submitted in the evidentiary hearing here included far more information than mere calls for service.

[6] *Accord, Daytona Grand*, 490 F.3d at 883-884.

(police study based upon calls for service data showed greater crime at bars that do not feature exotic dancing than adult entertainment venues, and served as a basis to invalidate the challenged law there).[7]

A CLEAR CIRCUIT CONFLICT EXISTS THAT WARRANTS REVIEW BY THIS HONORABLE COURT

Throughout its Opposition, the Commonwealth eschews the necessity of review of this case because, it contends, no conflicts in the circuits exist on these issues. *See, e.g.*, Opp. at 10 (" . . . the lower courts are *quite consistent in the results that they reach*"); 16-17 (" . . . lower courts have carefully followed this Court's precedents and have *reached consistent results* . . . "); and at 20-21 ("There is *no lower-court conflict* stemming from this case") (emphasis added).

However, only 29 days before submitting the response to this petition, the *same attorney who is representing the County here* asserted the existence of such a circuit conflict as a basis for seeking en banc review of these issues by the Tenth Circuit in *Abilene Retail*. *See* Petition for Rehearing En Banc (in *Abilene Retail*), Reply App. 2 ("The proceeding involves the following questions of exceptional

[7] There is also disagreement about the relevance of so-called "anecdotal" evidence. *Compare, for example, World Wide Video of Washington, Inc. v. City of Spokane*, 368 F.3d 1186, 1195-1196 (9th Cir. 2004) (anecdotal evidence can satisfy the government's initial burden), and cases cited therein, *with Top Flight, Inc. v. City of Inkster*, 2007 WL 643897 (E.D. Mich.), at *10 (anecdotal evidence insufficient to "cast direct doubt" upon governmental evidence).

importance, namely, that *the panel decisions conflict with the authoritative decisions of other United States Courts of Appeals . . . ,"* including, among others, *Daytona Grand*) (emphasis added); and at 16 (argument that the unanimous three-judge concurrence conflicts with *"every other circuit"* ruling on this evidentiary issue, and comparing, again, the Eleventh Circuit holding in *Daytona Grand*) (emphasis in original).[8]

Accordingly, that a clear circuit conflict exists so as to warrant review by this Honorable Court is demonstrated no better than by the *very words of the Commonwealth's own attorney*, albeit in another proceeding.[9]

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[8] Shortly before the filing of this reply brief, the Sixth Circuit chimed in, acknowledging the confusion regarding evidentiary standards. *See Hamilton's Bogarts, Inc. v. State of Michigan*, ___ F.3d ___, 2007 WL 2438044 (6th Cir.) at *6 n.7 (Discussing the "complicated nature of the analysis" under *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000), and finding that there "thus appears to be a difference in the evidentiary standard that the plurality and Justice Souter would require . . . ").

[9] Another circuit split is directly recognized by the court in *Abilene Retail*. In stating that it could not conclude that the county there met its initial evidentiary burden, by observing that "[s]uch a holding *would require complete deference to a local government's reliance upon prepackaged secondary effects studies from other jurisdictions to regulate any single sexually oriented business, of any type, located in any setting*," the Tenth Circuit noted that in so ruling "[w]e decline to adopt the reasoning of the Fifth Circuit on this point." *Abilene Retail*, 2007 WL 1982130, at *7 & n.10 (emphasis added), *distinguishing LLEH, Inc. v. Wichita County*, 289 F.3d 358 (5th Cir. 2002).

WHY THE CONFUSION OVER THIS EVIDENTIARY STANDARD JUSTIFIES THE GRANTING OF THE WRIT

The issue in this petition does not represent some meaningless, esoteric, evidentiary conundrum. Rather, the real underlying question is whether there is to be any true judicial check on otherwise unrestrained censorship.

This is because the type of secondary effects studies that McCracken County supposedly relied upon in enacting Ord. 2000-4, were prepared to justify dispersal-type zoning ordinances, which have subsequently been enacted and, presumably, have then rectified the secondary effects problems they were admittedly designed to address. Without placing some burden upon government to establish that secondary effects *still* exist so as to justify *additional* regulations, and without allowing a litigant a real ability to *refute* the claim that certain expression (subject to a specific set of existing regulations) engenders adverse secondary effects, governments will be free to enact a never-ending array of ever-more restrictive regulations until that expression is so suppressed that it will disappear from the marketplace.

The ability of government to engage in unchecked censorship of controversial speech and expression-related activities based on the oft-claimed concern of "adverse secondary effects," – which will certainly be the result if the decision of the Kentucky Supreme Court is allowed to stand – warrants this Court granting the petition.

CONCLUSION

For the reasons set forth above and in his Petition for a Writ of Certiorari, Petitioner respectfully requests this Honorable Court grant the petition for a writ of certiorari.

Respectfully submitted,

Dated: September 4, 2007

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App. 1

No. 05-3473

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

ABILENE RETAIL #30, INC.,

Plaintiff/Appellant,

v.

BOARD OF COMMISSIONERS OF DICKINSON COUNTY, KANSAS; KEITH D. HOFFMAN,

Defendants/Appellees.

PETITION FOR REHEARING EN BANC

Appeal from the United States District Court for the District of Kansas

---

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The County respectfully petitions the Court to rehear this matter en banc.

STATEMENT PURSUANT TO FED. R. APP. P. 35

A. The panel decisions conflict with the following decisions of the Supreme Court of the United States and the precedents of this court, and consideration by the full court is necessary to secure and maintain uniformity of the court's decisions:

1. *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986) (permitting small community to rely on secondary effects evidence from large metropolitan city).

2. *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000) (rejecting report by Daniel G. Linz, the expert witness for Abilene Retail in this case).

3. *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425 (2002) (holding local governments may rely on secondary effects evidence that is not on point).

4. *Z.J. Gifts D-2, L.L.C. v. City of Aurora*, 136 F.3d 683 (10th Cir. 1998) (upholding law making "retail-only" adult bookstore relocate at least 1,500 ft. from homes).

B. The proceeding involves the following questions of exceptional importance, namely, that the panel decisions conflict with the authoritative decisions of other United States Courts of Appeals that have addressed the issues, to wit:

1. *LLEH, Inc. v. Wichita County,* 289 F.3d 358, 366-67 (5th Cir. 2002) (holding that rural county could rely on secondary effects studies performed in cities).

2. *G.M. Enterprises, Inc. v. Town of St. Joseph,* 350 F.3d 631 (7th Cir. 2003) (holding that Dr. Linz's testimony is insufficient as a matter of law to "cast direct doubt" on legislative rationale and shift evidentiary burden under *Alameda Books*); *SOB, Inc. v. County of Benton,* 317 F.3d 856 (8th Cir. 2003) (same); *Gammoh v. City of La Habra,* 395 F.3d 1114 (9th Cir. 2005) (same); *Daytona Grand, Inc. v. City of Daytona Beach,* ___ F.3d ___, 2007 WL 1851169 (11th Cir. 2007) (same).

INTRODUCTION

This case presents the Lion's Den Adult Superstore's (Abilene Retail's) challenge to a County Ordinance regulating the time, place, and manner of sexually oriented business operations. The district court – noting the Ordinance's extensive legislative record (27 judicial opinions, 20 secondary effects reports, and expert witness reports) – followed *City of Los Angeles v. Alameda Books, Inc.,* 535 U.S. 425, 438 (2002), and this Court's on-point decision in *Z.J. Gifts D-2, L.L.C. v. City of Aurora,* 136 F.3d 683 (10th Cir. 1998), in upholding the Ordinance on summary judgment.

The panel reversed. The majority opined that none of the studies "examine businesses situated in an entirely rural area" (Maj. Op. 20), and thus held that a genuine issue of material fact exists as to whether the Board of County Commissioners adduced "any evidence that is

'reasonably believed to be relevant'" to support the Ordinance. *Alameda Books,* 535 U.S. at 438 (quoting *Renton,* 475 U.S. at 51-52 (1986)).

The concurring judge disagreed with the majority's conclusion (Concur. Op. 2-11), but joined in reversing the district court on the theory – heretofore rejected by *every* circuit court to address it – that Dr. Daniel Linz's testimony "casts direct doubt" on the Board's legislative rationale, requiring a trial. The majority joined in the concurrence "as an alternative ground for [their] holding." (Maj. Op. 2.)

This issue is vitally important to local governments. The majority decision undermines the ability of rural municipalities to regulate sexually oriented businesses, and the concurrence undermines the ability of all municipalities to do so.

This petition follows.

ARGUMENT AND AUTHORITIES

I. The majority's holding that the Board's extensive record is not "any evidence reasonably believed to be relevant" conflicts with decisions of the Supreme Court, this Court, and the only other circuit to address the issue.

In defending an ordinance regulating the secondary effects of sexually oriented businesses, a local government "may rely on *any* evidence that is 'reasonably believed to be relevant' for demonstrating a connection between speech and a substantial, independent government interest." *Alameda Books,* 535 U.S. at 438 (emphasis supplied) (quoting *Renton,* 475 U.S. at 51-52 (1986)).

Despite the County's extensive secondary effects record – including everything previously mentioned *and* secondary evidence from another *Lion's Den* store on the *same* interstate in another *rural* county (*see* App. 2538-2583, *esp.* 2548-2550 & 2578-2579) – the majority reversed the district court's summary judgment because none of the studies "examine businesses situated in an entirely rural area." (Maj. Op. 20.)

As an initial matter, the "rural vs. urban" distinction was *never argued by the plaintiff in the district court or in this Court.* Although the majority faults the County for not answering this argument (Maj. Op. 23), it first appeared in the majority's opinion. As Judge Ebel's concurrence recognizes, "Abeline Retail has never itself drawn that distinction, let alone presented any evidence to support that distinction." (Concur. Op. 14 n.7.) Abilene Retail's failure to make the argument is not surprising, given that the Supreme Court has consistently afforded local governments wide latitude to experiment with regulations and draw inferences from legislative evidence. *Alameda Books,* 535 U.S. at 437-39. Under the Court's precedents, the distinction is constitutionally irrelevant.

Second – as Judge Ebel's concurring opinion aptly demonstrates – the majority's holding that the County's voluminous record is insufficient to meet *Renton's* deferential standard is inconsistent with well-established Supreme Court and federal appellate precedent. (Concur. Op. 1-11.)

A. Requiring secondary effects evidence from "an entirely rural area" is contrary to *Renton*, *Alameda Books*, and *City of Aurora*.

As Judge Ebel correctly observes, the government's evidentiary burden is "very light" (Concur. Op. 4), and "[c]ourts have consistently upheld ordinances based on the same *type* of evidence" adduced by the County in this case. (*Id.* at 6-7) (emphasis in original) (citing *Renton* and several federal appellate cases).

In *Renton,* the Ninth Circuit had invalidated the Renton ordinance on the ground that Renton failed to show that its legislative evidence – from Seattle, a city twenty times Renton's size – was relevant "to the particular problems or needs of Renton." *Playtime Theatres, Inc. v. City of Renton,* 748 F.2d 527, 537 (9th Cir. 1984). The Ninth Circuit also emphasized that "[a]lthough the Renton ordinance *purports* to copy Detroit's and Seattle's," it adopted a zoning approach different than both of them. *Id.* at 536 (emphasis in original).

The Supreme Court reversed on all counts, stating that "[i]t is clear" that the Renton ordinance "is designed to serve a substantial government interest and allows for reasonable alternative avenues of communication." *Renton,* 475 U.S. at 50. The Court rejected the more "rigid burden of proof" imposed by the Ninth Circuit and held that a local government is not required to "produce evidence independent of that already generated" by other jurisdictions, as long as the government relies on some evidence "reasonably believed to be relevant" to the problem it seeks to address. *Id.* at 51-52.

The Court then stated:

> Nor is our holding affected by the fact that Seattle ultimately chose a different method of adult theater zoning than that chosen by Renton, since Seattle's choice of a different remedy to combat the secondary effects of adult theaters does not call into question either Seattle's identification of those secondary effects or the relevance of Seattle's experience to Renton.
>
> We also find no constitutional defect in the method chosen by Renton to further its substantial interests. Cities may regulate adult theaters by dispersing them, as in Detroit, or by effectively concentrating them, as in Renton. "It is not our function to appraise the wisdom of [the city's] decision to require adult theaters to be separated rather than concentrated in the same areas. . . . [The] city must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems." [*Young v.*] *American Mini Theatres*, 427 U.S.[50], at 71 (plurality opinion).

Id. at 52.

The majority opinion in this case contravenes *Renton* and its progeny. The majority recognizes that "most, if not all," of the County's studies "find that adult businesses trigger at least some secondary effects in the surrounding areas," but the majority concludes that these findings "rest on" a "number of factors, including: [1] the type of neighborhood in which the sexually oriented businesses are located, [2] the concentration of sexually oriented businesses, and [3] the nature of the sexually oriented business itself." (Maj. Op. 18-19, footnotes omitted.) Based on these factors, the majority concludes that the County cannot reasonably rely on *any* of the studies to regulate a

"single adult bookstore, located on a highway pullout far from any business or residential area within the County." (Maj. Op. 20.)

As a factual matter, the Lion's Den Adult Superstore is not "far from any business . . . area within the County" – it is in a business (B-1) zone. Second, it is close (less than 1,200 ft.) to a family residence. Indeed, this Court has upheld a *1,500-ft.* buffer from residences, even as applied to a "retail" adult bookstore. *City of Aurora,* 136 F.3d at 685 (upholding ordinance requiring adult bookstore to relocate to a site at least 1,500-ft. from, *inter alia,* "residential districts or dwellings. . . . ").

To support the three prongs comprising its more rigid burden of proof (Maj. Op. 24) (*i.e.*, location, concentration, and type of business), the majority quotes statements from the studies – *none* of which were quoted by plaintiff.

In support of the first prong (location), the majority cites a statement (*see* Maj. Op. 19 n.7) from the Austin, Texas, study that suggests restricting sexually oriented businesses to regional commercial zoning districts, which include interstates. Later, the majority quotes this same statement for its view that requiring the relocation of The Lion's Den Adult Superstore away from its present location (at an interstate interchange and close to a residence) violates the Board's reliance on the studies. (Maj. Op. 24.)

As in *Renton,* however, this criticism goes to the "method chosen" to address secondary effects, not the identification of those effects. 475 U.S. at 52.

Moreover, it plainly contravenes *Renton's* admonition that courts should not "appraise the wisdom" of the County's legislative solution. *Id.*; *see also City of Aurora,*

136 F.3d at 689 (noting that "*Renton's* constitutional framework" gives the government "broad discretion to choose the means and scope of its regulation of sexually oriented businesses," and that the judiciary's role in review is "limited").

In a rural county, land at interstate interchanges may well be the most valuable commercial real estate in the jurisdiction. It also may be a location where the community is seeking to spur economic growth and development, protect "retail trade, maintain property values," *etc. Renton,* 475 U.S. at 48. Sexually oriented businesses at these locations can deter positive development and can also attract prostitutes catering to truckers. Further, the record in this case includes a permanent injunction order against another Lion's Den Adult Superstore located at an interstate interchange in another *rural* county (Effingham County, Illinois) on the *same* interstate (I-70). (App. 2538-2583.) There, the court found significant evidence of secondary effects on the surrounding vicinity, including incidents of solicitation, litter of sex toys and related materials, and decreased use of a nearby public park. (App. 2548-2550.) The court concluded that the community was "irreparably harmed by the continuing increased exposure to the negative secondary effects resulting from close proximity to" the Lion's Den. (App. 2578-2579); (*see also* App. 2494-2496) (noting increase in serious crime after opening of that store).

The majority's second prong, "the concentration of sexually oriented businesses," is an improper basis under *Renton* for nullifying the Board's reliance on the studies. First, to the extent that the studies documented secondary effects associated with concentrations of adult businesses, the County's ordinance serves the interest in preventing

those effects by prohibiting a sexually oriented business within "1200 feet of any structure occupied by another sexually oriented business." Ordinance No. 121304A § 21(b)(1). Second, *Renton* recognizes the government's substantial interest in "preventing the secondary effects caused by the presence of even one" adult business. 475 U.S. at 50.

The third prong, the "nature of the sexually oriented businesses" studied, does not determine the propriety of reliance on the studies. The Supreme Court has repeatedly allowed local governments to rely on evidence from one type of adult business to regulate another type of adult business. *See, e.g., Alameda Books,* 535 U.S. at 438 (citing *Barnes v. Glen Theatre, Inc.,* 501 U.S. 560, 584 (1991) (Souter, J., concurring in judgment), for the proposition that government may "use evidence that adult theaters are correlated with harmful secondary effects to support its claim that nude dancing is likely to produce the same effects"). The requirement is simply that the government refrain from regulating "businesses which have a minimal or nonexistent connection to sexually oriented entertainment." *City of Aurora,* 136 F.3d at 689.

Indeed, *Alameda Books* reiterated, if not expanded, the deferential *Renton* standard by allowing local governments to rely on *inferences* and by emphasizing that they "must be given a reasonable opportunity to experiment" in regulating to prevent secondary effects. *Alameda,* 535 U.S. at 439; *id.* at 444 (Kennedy, J., concurring in judgment) (noting that "the plurality's application of *Renton* might constitute a subtle expansion").

The Supreme Court has upheld regulations of sexually oriented businesses where the government relied on: (1) no

evidence of secondary effects *at all, Barnes,* 501 U.S. at 568; (2) a case and secondary effects study from a very different jurisdiction, *Renton,* 475 U.S. at 51; and (3) a local study that was admittedly not on-point. *Alameda Books,* 535 U.S. at 436. But *no court* has ever held that a legislative record as extensive as Dickinson County's fails to meet the deferential "reasonably believed to be relevant" standard.

B. The majority's holding conflicts with the authoritative decision of the only other circuit that has directly addressed the issue.

After raising the "rural vs. urban" distinction *sua sponte,* the majority rejected the Fifth Circuit's on-point holding in *LLEH, Inc. v. Wichita County,* 289 F.3d 358 (5th Cir. 2002). (Maj. Op. 20 n.10) (holding rural county can rely on studies done in cities).

The Board *specifically relied* on the *LLEH* case when adopting the Ordinance (*see* App. 1564) (presentation to Board giving prominence to *LLEH* case), *and* incorporated the case into its legislative findings. *See* Ordinance § (1)(b).

Nevertheless, the majority criticized the Fifth Circuit for allowing Wichita County to consider the county's "continued growth and development" in adopting sexually oriented business regulations. (Maj. Op. 20 n.10.) The majority reasoned that "[n]othing, of course, prevents the [Dickinson County] Board or any other legislative body from reconsidering its zoning laws in the event that it sees an uptick in the number of sexually oriented businesses locating in its jurisdiction."

This analysis turns *Renton* on its head. *Renton* held that local evidence of secondary effects is not required and that communities can be proactive in regulating adult businesses to prevent such effects. 475 U.S. at 51-52. The majority would require local governments to act after the fact – only after they have experienced an "uptick" in adult businesses and have experienced their negative secondary effects.

Even the authorities that the majority cites belie its argument. *See Barnes,* 501 U.S. at 568 (upholding regulation with *no legislative record*); *Essence, Inc. v. City of Federal Heights,* 285 F.3d 1272, 1285 (10th Cir. 2002) (upholding reliance on experience of other jurisdictions, concluding that city "need not wait until the secondary effects actually exist," and treating legislative findings as "particularized, expert judgments").

LLEH quoted and followed *Renton,* 475 U.S. at 51-52, explaining that:

> To the extent the district court focused on the area in Babe's immediate vicinity, the court erred. "Regulations that burden speech incidentally or control the time, place, and manner of expression must be evaluated in terms of their *general* effect." *United States v. Albertini,* 472 U.S. 675, 688-89, 86 L. Ed. 2d 536, 105 S. Ct. 2897 (1985) (emphasis added). Moreover, "the First Amendment does not bar application of a neutral regulation that incidentally burdens speech merely because a party contends that allowing an exception *in the particular case* will not threaten important government interests." *Id.* at 688 (emphasis added; citing *Clark v. Community for Creative Non-Violence,* 468 U.S. 288,

296-297, 82 L. Ed. 2d 221, 104 S. Ct. 3065 (1984)).

LLEH, 289 F.3d at 366-67.

Here, the majority opinion contravenes not only *Renton* and *LLEH,* but also well-settled principles of the time, place, and manner doctrine.

II. The concurring opinion, which the majority joined as an alternative ground for its holding, conflicts with decisions of the Supreme Court and *every other circuit* to address the issue.

The concurrence thoroughly explains all the reasons why the majority's holding is erroneous. (Concur. Op. 2-11.) Thereafter, the concurrence examines the testimony of Abilene Retail's expert witness, Dr. Daniel Linz, who: (1) authored, jointly with his graduate assistant and an adult business lawyer, a law review article (*see* App. 2023) that challenges the validity of secondary effects studies under the standards set forth in *Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 509 U.S. 579 (1993), (2) criticized certain reports in the County's record for not meeting proper "methodological standards," and (3) conducted five studies of his own purporting to indicate that sexually oriented businesses do not cause adverse secondary effects.

The concurrence holds that Dr. Linz's testimony casts direct doubt on the record and rationale for the County's ordinance. (Concur. Op. 2.) The majority joined this holding as an alternative ground for its ruling. (Maj. Op. 25 n.13.) That holding is contrary to Supreme Court precedent and every other circuit court case on point.

A. The concurring opinion's holding – that Dr. Linz "cast direct doubt" on whether the Board meets "the standard set forth in *Renton*" – is contrary to *Erie* and *Alameda Books*.

In *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000), Dr. Linz submitted, as an appendix to an *amicus* brief filed by adult business lawyers, a paper attacking several secondary effects studies relied upon by legislative bodies on the ground that they did not meet the standards set forth in *Daubert*. *See* Brief and Appendix of First Amendment Lawyers Association, 1999 WL 805047, *20 (noting that according to Dr. Linz's attached paper, "absolutely none of the studies that purport to find such a connection [between sexually oriented businesses and secondary effects] have been conducted with methodology sound enough" to satisfy *Daubert*).

In *City of Erie*, Justice O'Connor's plurality noted the city council's legislative findings – which were unsupported by any evidence in the record – were to be treated as "expert judgment" that "should be credited." 529 U.S. at 298. The plurality then addressed Dr. Linz's paper: "And the study relied on by *amicus curiae* does *not cast any legitimate doubt* on the Erie city council's judgment about Erie. See Brief for First Amendment Lawyers Association as *Amicus Curiae* 16-23." *Id.* (emphasis supplied).

Later, in addressing Justice Souter's dissenting opinion that empirical proof should be required, the plurality again referenced Dr. Linz's paper and stated that the Court had "flatly rejected" the idea "that the 'invocation of academic studies said to indicate' that threatened harms are not real is insufficient" in the legislative context. *Id.* at 300 (quoting *Nixon v. Shrink Missouri Gov't*

PAC, 528 U.S. 377, 394 (2000) (rejecting First Amendment challenges to campaign regulations)).

The Linz paper *rejected* in *City of Erie* was published the next year – not in a criminology journal, but in a legal journal (Communication Law & Policy) – and this article is what the concurrence references. (Concur. Op. 16); *Compare* 1999 WL 805047, Appendix (Paper) (Section II: "The Basic Requirements for the Acceptance of Scientific Evidence – Such as "Secondary Effects Studies" Produced by Indianapolis, Phoenix, Los Angeles, and St. Paul – Have Been Prescribed by this Court in *Daubert v. Merrell Dow,* 509 U.S. 579 (1993)) *with* (App. 2034) ("The basic requirements for the acceptance of scientific evidence, such as secondary effects studies, were prescribed by the Supreme Court in the 1993 case of *Daubert*. . . . ").

In *Alameda Books,* the plurality – again over Justice Souter's dissent *and* a Linz paper submitted with an *amicus* brief, *see* 2001 WL 950921 – *rejected* a requirement of empirical evidence and emphasized that when challenging whether *Renton's* deferential standard has been met, the challenger must address "the *municipality's* rationale," not an alternative rationale as imposed by an industry's witness. 535 U.S. at 437-39.

Dr. Linz does not dispute *any* of the facts recited in *any* of the studies, only the conclusions to be drawn from them. Because he applies a different standard – one much higher than the Supreme Court requires – he rejects any reliance on any study that finds secondary effects. However, the purpose of *Alameda Books* burden-shifting is simply to ensure that the Board "meets the standard set forth in *Renton*," *id.* at 439, not *Daubert* or Dr. Linz's idiosyncratic permutation of that standard. The concurrence

accepted Dr. Linz's view and, in doing so, contravened Supreme Court precedent.

B. The concurrence conflicts with *every other circuit* to address the issue.

As an expert witness on behalf of the adult business industry, Dr. Linz has offered the same testimony in many other cases. *Every* other circuit court to address the issue has held that Dr. Linz's testimony, his Communication Law & Policy article, *etc.*, is insufficient as a matter of law to cast direct doubt on the municipality's secondary effects evidence. *See G.M. Enterprises, Inc. v. Town of St. Joseph,* 350 F.3d 631 (7th Cir. 2003); *SOB, Inc. v. County of Benton,* 317 F.3d 856 (8th Cir. 2003); *Gammoh v. City of La Habra,* 395 F.3d 1114 (9th Cir. 2005); *Daytona Grand, Inc. v. City of Daytona Beach,* ___ F.3d ___, 2007 WL 1851169 (11th Cir. June 28, 2007).

In *Daytona Grand,* the district court denied summary judgment to the city on the secondary effects issue and, after a bench trial, granted judgment to the sexually oriented business. The Eleventh Circuit reversed, holding that the sexually oriented businesses' evidence, including Dr. Linz's expert testimony, was legally insufficient to "cast direct doubt" on the municipality's secondary effects rationale and shift the evidentiary burden under *Alameda Books.* In fact, the Eleventh Circuit noted that Dr. Linz's "own analysis shows a statistically significant correlation between adult theaters and increased crime in half of the areas in the study," 2007 WL 1851169 at *17, and "could be read to support part of the City's rationale for Ordinance 81-334," *id.* at *17 n.34.

In all other cases listed above, the circuit courts affirmed summary judgment for the municipality notwithstanding Dr. Linz's testimony. Thus, the panel's holding that Dr. Linz's testimony casts direct doubt on the County's evidence is in direct conflict with every other circuit court to address the issue.

C. The concurrence also violates *Alameda Books* by reversing the judgment even though it found that the Board supplemented the record with evidence renewing support for the Ordinance.

The concurrence violates Supreme Court precedent in yet another way. In *Alameda Books,* the Court held that if plaintiffs successfully shift the evidentiary burden, the municipality need only "supplement the record with evidence renewing support for a theory that justifies its ordinance." 535 U.S. at 439.

Here, the concurrence finds that the County met this burden through its expert witness, Dr. McCleary. Dr. McCleary submitted an expert report prior to the adoption of the Ordinance (App. 1430-1455), and submitted an additional report in the litigation. (App. 2472-2533.) He testified that (1) the studies and opinions of Dr. Linz are invalid, and (2) the reports on which the County relies are reliable. (Concur. Op. 17.) This finding satisfies *Alameda Books* and requires judgment for the County.

Nevertheless, the concurrence holds that the County's supplemental evidence creates a "battle of the experts" involving credibility determinations that require a trial. (Concur. Op. 18.) However, *none* of the authorities cited involved the constitutionality of legislation. In that context

– even in a First Amendment case – experts' disagreement over the need for regulation does not require a trial. *Turner Broadcasting System, Inc. v. F.C.C.*, 520 U.S. 180, 211 (1997) (affirming summary judgment in First Amendment case with many experts, and holding the "question is whether the legislative conclusion was reasonable and supported by substantial evidence. . . . If it is, *summary judgment for defendants-appellees is appropriate regardless of whether the evidence is in conflict*").

Thus, the concurrence's own finding shows that the district court's decision is correct.

CONCLUSION

For the reasons stated herein and in its opening Brief, the County petitions the Court to grant rehearing en banc and affirm the decision of the district court in its entirety.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 24, 2007 two copies of the foregoing petition for rehearing en banc (with attached panel decision in Digital Form) were sent by overnight delivery, postage prepaid, and were sent via email to:

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and that the original and eighteen copies were sent by overnight delivery and via email to:

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Byron White U.S. Courthouse, 1823 Stout Street
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esubmission@ca10.uscourts.gov

I further certify that all required privacy redactions (for this submission, none) have been made and, with the exception of those redactions, every document submitted in Digital Form or scanned PDF format is an exact copy of the written document filed with the Clerk; I also certify that the digital submissions have been scanned for viruses with the most recent version of a commercial virus scanning program (Norton Antivirus 2007 updated July 24, 2007) and, according to the program, are free of viruses.

s/ Scott D. Bergthold
Scott D. Bergthold

COMMONWEALTH OF KENTUCKY
McCRACKEN DISTRICT COURT
CASE NO: 00-M-01796
CASE NO: 00-M-01797

COMMONWEALTH OF KENTUCKY	PLAINTIFF
VS.	
JOANN WARNER	DEFENDANT
and	
COMMONWEALTH OF KENTUCKY	PLAINTIFF
VS.	
EDWARD GREEN JAMESON	DEFENDANT

TRANSCRIPT OF EVIDENTIARY HEARING
HON. BARD K. BRIAN, PRESIDING JUDGE
October 18th, 2001

Commonwealth represented by:

Hon. Doug McCann
Asst. County Attorney

Defendant represented by:

Hon. Delbert K. Pruitt
Bryant & Kautz PSC

Witness:

Brent Stringer – E911 Director
Melissa Meyer – Shift Manager – The Playhouse
Joann Warner – Defendant

* * *

[6] *Direct Examination by Mr. Pruitt*:

Q. State your name please.

A. Brent Stringer, S-T-R-I-N-G-E-R.

Q. Okay and where are you employed Mr. Stringer?

A. Paducah/McCracken E-911 Communication Services.

Q. Okay and what's your position there?

A. Acting chief dispatcher.

Q. Okay and what duties does that entail?

A. Basically scheduling, keeping up the computer, uh, maintaining the operations, daily operations of the center.

Q. I'm going to show you some documents, Mr. Stringer. If you would take a look at 'em, I'm going to identify 'em.

[7] MR. PRUITT: If I may approach him, Your Honor.

JUDGE BRIAN: Yes.

A. These here are our records that reflect activity at various locations; it's a question that we had been requested to research.

Q. And that was pursuant to my subpoena, correct?

A. Right.

Q. Generally tell the Court what these records show?

A. These records will show basically the activity that's, that involve, these activity involve the lives of these addresses, particular dates, times and what exactly the incident or occurrence was at that particular location for a given date.

JUDGE BRIAN: Let me interrupt Mr. Pruitt. What was the subpoena for because I have not seen the subpoena so that might help lay a basis for what you're going to talk about?

MR. PRUITT: I'll give you the subpoena.

JUDGE BRIAN: That's what I want is just the subpoena so I'll know what he's about to testify to. I know they're records but I don't know what you subpoenaed. Okay, go ahead Mr. Pruitt.

Q. Now what do you mean by activity Mr. Stringer?

A. These are calls that we received from those locations or activity that was self-initiated by an officer. Various types of complaints.

Q. Would that –

A. These complaints I put a label here on the printouts.

Q. Does that include all calls from all law enforcement agencies?

A. Calls within our jurisdiction, the City of Paducah and the McCracken County Sheriff's Department.

Q. Any any other calls that came in over 911 itself?

A. 911 or the administration lines.

* * *

[15] Cross-Examination by Commonwealth:

Q. Yes, Mr. Stringer can you tell us how arrests are made in the same time period at Ginger & Pickles?

A. No sir I can't.

Q. Or Regina's II?

A. I sure can't.

Q. Your records don't reflect that type of information?

A. It does reflect that type of information but it would take I mean I could probably look at that and find the number of arrests but it would take – these particular records here no I'd have to look at the individual ones.

Q. Let me rephrase the question, do they reflect all the arrests at Ginger & Pickles?

A. They should.

Q. If an officer makes any arrest for any reason it would show on the records?

[16] A. Yes.

Q. Would it show the number of complaints from these two?

A. Explain that to me.

Q. Would it show the number of complaints of people calling and complained about those drug dealings or prostitution or anything like that?

A. These they don't, it shows where actually the officers were sent to the locations.

Q. So it would show complaints which were made for ['inaudible]

A. No only the activity that we actually had officers responding to.

Q. And any time an officer went in there as an undercover investigation [inaudible]?

A. They would reflect that information if there was an arrest made or they wanted to, if they were making a report on the incident they would call and get a service request number and there would be active a generated card activated on that.

[17] Q. If an agency made an undercover investigation to determine whether certain complaints had any validity or not, your records wouldn't necessary reflect that?

A. There are times when they do reflect that whenever they are actually in these establishment, not probably at the time they're in the establishment but what times that they do some type of investigation, if they go in there undercover and recover some type of drug paraphernalia or drugs they'll call, they'll make a report on that and they'll generate information. In those aspects, yes they are recorded.

Q. Whenever an undercover investigation happens at Ginger & Pickles or big Kahauna or Regina's II it would show on your records?

A. The ones that I'm aware of are on here. Now I'm not saying that every one that they actually do is recorded. They may do some that we do not know about but the ones I'm referring to are the ones that actually and if I need information or want a service request number generated for my activity there [18] tonight. Now if they went out

there Tuesday night and didn't tell nobody I'd have no way of knowing that.

MR. McCANN: I have nothing further.

* * *